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A

HISTORY

OF THE

ENGLISH LAW,

FROM THE

BEGINNING of the REIGN of EDWARD the SECOND

TO THE

END of the REIGN of HENRY the SEVENTH.

By JOHN REEVES, Esq.

BARRISTER at LAW.

Coment que certaines choſes, queux ſont notes et ſpecifies en le dit livre, ne ſont pas ley, uncore tielx choſes ferra toy plus apt et able de entender et apprendre les arguments et les reaſons del ley.

LITTLETON's Tenures.

LONDON:

PRINTED BY T. WRIGHT;

For E. BROOKE, Bell-Yard, Temple-Bar.

M,DCC,LXXXIV.

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BRITISH MUSEUM

TO THE

RIGHT HONOURABLE

WILLIAM, EARL OF MANSFIELD,

LORD CHIEF-JUSTICE OF HIS MAJESTY'S COURT OF KING'S-BENCH.

MY LORD,

PERMIT me to preſent to your Lordſhip a ſecond volume of the HISTORY OF THE ENGLISH LAW. The approbation which your Lordſhip has been pleaſed to expreſs of my poor endeavours to promote this hiſtorical method of ſtudying our law, encourages me to hope, that the preſent volume may meet with a favourable reception. If this Hiſtory proceeds further, it will be intirely owing to the ſupport I feel in ſo high a teſtimony as your Lordſhip's good opinion.

THE condeſcending attention and approbation of perſons like your Lordſhip, is the beſt and only recompence to be expected, when a lawyer ſacrifices his time in illuſtrating, and giving novelty to, profeſſional

 knowledge.

knowledge. From the want of this condeſcenſion and encouragement, the Hiſtory of the Law was near failing for ever, at leaſt in my hands; but, ſince my humble attempt has excited your Lordſhip's notice, and I am aſſured from ſuch an authority that this is a work to be perſiſted in, I feel myſelf inſpired with new zeal; and may, perhaps, be induced to continue the Hiſtory to later times. In the mean while, I ſhall venture to meet the public opinion with ſecurity, thus ſheltered under the patronage of a name ſo revered as that of your Lordſhip.

I AM, MY LORD,

WITH ALL RESPECT AND THANKS,

YOUR LORDSHIP's

MOST OBLIGED AND DEVOTED HUMBLE SERVANT,

THANET-PLACE, TEMPLE,
MARCH 2, 1784.

JOHN REEVES.

ADVERTISEMENT.

LEST the Reader ſhould have been induced, from the former part of this Work, to conceive any expectations which may be diſappointed in the preſent volume, I muſt beg his attention to certain conſiderations which I ſhall venture to ſtate by way of apology for the matter and form of it.

THE utility of a Hiſtory like the preſent, appeared to me very ſtrongly in the earlier part of my ſtudies; and this excited me to undertake it, at a time when I could not pretend to accompliſh any thing more than a ſketch, which might be completed at a future period, after greater reflection and experience. I accordingly deduced an Hiſtorical Treatiſe of the Law to the end of the reign of Queen Elizabeth, ſufficient to fill a quarto volume; and as I had finiſhed the latter part of this work more to my ſatisfaction than the former, I began by printing the reign of HENRY VII. and thoſe which follow, calling it a *Second Part* of the intended volume; purpoſing in the mean time to employ myſelf in improving the former part. At length, I foreſaw the additions I was making to the *Firſt Part* would grow out of all proportion, and that it would be adviſable to ſtop printing what was too ſcanty and imperfect to make a continuation of

of the Hiſtory, which I had now written intirely a-new, and upon a more enlarged plan. This I did, and went on with the additions down to the end of the reign of EDWARD I. which concludes the firſt volume of the Hiſtory.

THINKING I had now hit upon the only plan on which a work of this ſort could be made uſeful, I reſolved to perſevere in enlarging the contents of the ſecond, as I had done thoſe of the firſt volume, and to cancel what I had printed, being a ſacrifice not to be conſidered, when compared with the advantage I thought the work would derive from the acceſſions it would receive. In this reſolution I continued till I had completed the reign of EDWARD III. when I began to think there was ſome reaſon to ſuppoſe I was wearying myſelf to no purpoſe in a ſupererogatory toil, which produced nothing that could recommend itſelf: I found alſo, that prudence, as well as my own eaſe and comfort, required I ſhould ſhorten all applications that were wholly unprofitable. I accordingly determined to finiſh the preſent volume (as well as to drop any further purſuit of the Hiſtory of the Law) in the ſhorteſt way poſſible; which was, by ſubjoining the firſt manuſcript in its original ſtate, from the end of EDWARD III. to the end of RICHARD III. and taking in the reign of HENRY VII. from the ſheets before printed, without adding the following reigns, which would be only increaſing the bulk of what was already too large, conſidering its imperfections.

THIS is the reaſon, and this my apology for the ſingular appearance of the preſent volume; which, after what has been ſaid, cannot be conſidered as a ſpecimen of the manner in which I wiſhed this work ſhould be continued. Though I except out

of

of this cenſure the reigns of EDWARD II. and III. for the remainder I muſt beg allowance to be made, and that it may be conſidered only as a part of a larger work, to which though much might be added, yet I am free to confeſs, that the ſubjects I have diſcuſſed have received all the conſideration I could give them. I mean to ſay, that the ſtatute-law of theſe reigns is treated as fully as is required by the enlarged plan of the Hiſtory; but, from the deciſions of courts, only ſuch ſelect topics are choſen as ſeemed more particularly ſtriking.

WHEN I ſtate the defects of the preſent volume, it is with a reference to my own ideas of the work, and the opinions of ſome friends, whoſe judgement I can rely on with confidence. Many readers, however, perhaps may think otherwiſe; and that, after the large and ſubſtantial foundation which has been laid by connecting the Year-books of EDWARD III. with Bracton, and our older writers, the remainder of the enquiry might be treated with leſs detail and prolixity. To ſuch, the latter part of this volume may be more acceptable in its preſent form, than if I had beſtowed upon it that labour, and given it thoſe additions, which ſeemed to me neceſſary to preſerve a proportion and ſymmetry in the whole. At any rate, this volume, as it contains ſpecimens of two methods in which the Hiſtory may be continued, will enable me to collect what is generally thought of both, and which of them it would be adviſable to adopt, ſhould I reſume the ſubject.

THE ſtatutes making ſo large a proportion of this volume, it may be neceſſary to bring to the Reader's recollection a circumſtance which has been greatly miſconceived by many. It has been appre-

hended,

hended, that great light might be thrown on our ſtatutes by the civil hiſtory of the times in which they were made. But it will be found on inquiry, that theſe expectations are rarely ſatisfied. The *lay* hiſtorians, like the body of the people, were as unconcerned in the great revolutions of legal learning in thoſe days, as in ours: and we now ſee a ſtatute for encloſing a common, or erecting a work-houſe, make no ſmall figure in the debates of parliament; while an act for the *amendment of the law* in the moſt material inſtances, ſlides through in ſilence. Yet the latter would become an important fact to the juridical hiſtorian, while the former was paſſed by unnoticed. I believe little is to be acquired by travelling out of the record; I mean, out of the ſtatutes and year-books, the parliament-rolls, and law-tracts; and we muſt be content to compoſe a tolerable narrative out of ſuch rugged materials.

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HISTORY

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OF THE
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PART II.

CHAP. IX.

EDWARD II.

Statutum de Militibus—Statute de Frangentibus Priſonam—Statute of Articuli Cleri—Sheriffs to be nominated by the Judges—Statute of Gavelet—Of levying Fines—The Statute Prærogativa Regis—Of Homage and Fealty—Statuta Incerti Temporis—Poſſeſſio Fratris, &c.—Gifts in Tail—Of Writs of Formedon—Other real Writs—Writs of Conſpiracy and Deceit—Action of Debt—Detinue de Rationabili Parte—Actions of Accompt—Action of Treſpaſs—Of Pleadings and Arguments in Court—The Criminal Law—The King and Government—The Vetera Statuta—The Year-Books—The Mirror—Miſcellaneous Facts.

THE reign of this king does not make ſo inconſiderable a figure in our juridical as civil hiſtory: notwithſtanding the weakneſs of the executive power, the juridical eſtabliſhment of our forefathers, and the reformation made therein by Edward I. continued unſhaken. In ſome points this reign has an advantage over all the former, when viewed by a modern lawyer; for the earlieſt report of caſes adjudged in court is the Year-Book of this king *(a)*: this opens a new ſource of information, which will enable us to purſue our inquiries into the progreſs of legal knowledge and improvement with more certainty and effect. We ſhall, as in the former Part, divide the matter of each reign into ſuch as is fur-

(*a*) That is, *printed* Report; for there are ſaid to be Reports of Adjudged Caſes of the time of Edward I. in MSS. in certain libraries.

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niſhed by ſtatutes, and that which may be collected from the deciſions of courts. We ſhall begin with the former.

Statutum de militibus.

THE firſt ſtatute in this reign is the *ſtatutum de militibus*, which is ſaid to be not properly a legiſlative act, but a writ granted by the king in time of parliament, and entered, by his direction, on the record; and from this circumſtance it is ſaid to have acquired the name of a ſtatute *(a)*. We have not yet met with any regulation for aſcertaining what ſhould be the meaſure of a knight's fee; and probably it had been various at different times, depending upon the pleaſure of the crown and the compliance of the people. On the occaſion of a new levy, it was now thought convenient, that directions ſhould be given for the government of the king's officers in collecting this revenue, as was done by this writ; in which the king *granted*, in the firſt place, a reſpite to all thoſe who ought, but had omitted to become knights, and were then diſtrained *ad arma militaria ſuſcipienda*. Further, it directed, that if any complained in the chancery that he was diſtrained, and had not land to the value of twenty pounds, in fee, or for term of his life, and was ready to verify that by the country, then ſome diſcreet and lawful knights of the county ſhould be written to, in order to make inquiſition of the matter; and if they found it to be ſo, he was to have redreſs, and the diſtreſs was to ceaſe: again, where a perſon was impleaded for the whole, or ſuch a part of his land, that the remainder was not of the value of twenty pounds, and he would verify that, then the diſtreſs ſhould ceaſe till that plea was determined: again, where a perſon was bound in certain debts ſtalled in the exchequer, at a certain ſum to be received thereof annually, and the remainder of his land was not worth twenty pounds *per annum*, the diſtreſs ſhould ceaſe till the debt was paid. None was to be diſtrained *ad arma militaria ſuſcipienda*, till the age of twenty-one; nor any on account of land which he held in manors of the antient demeſne of the crown, as a ſokeman; as thoſe lands muſt pay a talliage, when the king's lands were talliaged. With reſpect to thoſe who held land in ſocage of other manors, and who performed no *ſervitium forinſecum (b)*, the rolls of the chancery were to be ſearched for the times of the king's predeceſſors, and it was to be ordered according to the former cuſtom: the ſame of clerks in holy orders, holding any law fee, who would be liable to become knights, if they were laymen. No one was to be diſtrained for his burgages, though they were of the value of twenty pounds

(*a*) 2 Inſt. 593. (*b*) Part I. 206.

or

or more. Thoſe who ought to become knights, and who had had their land only a ſhort time; thoſe who were extremely old, or had any infirmity in their limbs; or alledged that they had ſome incurable diſeaſe, or the impediment of children, or law-ſuits, or other neceſſary excuſes; ſuch perſons were to appear before two commiſſioners appointed, and make fine before them; and theſe commiſſioners were to take diſcretionary fines from ſuch diſabled perſons, by way of compoſition. Thus was proviſion made for the due payment of the king's caſualties, upon which the defence of the realm depended, while the extreme rigor of theſe exactions was ſomewhat abated.

Statute de frangentibus priſonam.

THERE is another act of the ſame year, called *ſtatutum de frangentibus priſonam*. It appears *(a)* that, by our old law, a priſoner, for whatever cauſe, breaking out of the king's priſon was eſteemed guilty of felony. In the 23d of Edward I. an act was made in the very words of this we are now going to ſpeak of, making ſome alteration herein. That act is not in our printed books, but this only of 1 Ed. II. which probably was nothing more than a recital and affirmation of the former *(b)*, but has had the ſucceſs to reach poſterity, and render the former unneceſſary and forgotten. This act ordains, that none from henceforth who broke priſon, ſhould have judgment *vitæ et membrorum* for breaking priſon only, unleſs the cauſe for which he was taken and impriſoned required ſuch a judgment, if he was lawfully convicted thereof.

IN the ſecond year of this king there is a public inſtrument for the purpoſe of enforcing the ſtatute of *Articuli ſuper chartas*; and in the following year another, intitled, *Litteræ patentes ſuper priſis bonorum cleri*, for obſerving a ſtatute made in the laſt reign, in protection of religious ſocieties, and eccleſiaſtical men, againſt the taking of their goods without their conſent *(c)*. In the 7th year of the king there are two acts intitled, one, *Ne quis occaſionetur pro reditu*; the other, *Pro captione et morte Petri de Gaveſton*; after which, in the 9th year, is the famous ſtatute called *Articuli cleri*, made at Lincoln.

Statute of articuli cleri.

THIS act was to adjuſt ſome of thoſe eccleſiaſtical claims of cognizance which have been ſo often mentioned. We are told, that a ſimilar method had been purſued by the clergy in the reign of Henry III. At the parliament holden in the 51ſt year of that king, they exhibited ſome articles, as grievances to be removed, under the name of *Articuli cleri*. Theſe received anſwers which are ſtill extant *(d)*. About the beginning of the reign of Edward I. an act of parliament was made, intitled, *Probibitio*

(a) Part I. (b) 2 Inſt. 589. (c) Part I. 372. (d) 2 Inſt. 599, &c.

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formata de ſtatuto articuli cleri. At another parliament holden in that king's reign, the clergy preferred articles again, intitled, *Articuli contra prohibitionem regis*; to which anſwers were given, tending to aſcertain the boundaries of temporal and eccleſiaſtical juriſdiction (*a*). Upon theſe, and the ſtatute of *Circumſpectè agatis* (*b*), did this diſpute reſt, till the preſent parliament, when Walter Reynolds, archbiſhop of Canterbury, in great eſteem with the king, in the name of himſelf and the clergy preferred the following ſixteen articles, and received by authority of parliament anſwers *ſeriatim* to every one of them.

THE firſt articles were theſe: That laymen purchaſed prohibitions generally upon tithes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in caſes of defamation, where ſpiritual penance was the proper puniſhment. To this the king anſwered (conformably with the regulation of the ſtatute of *Circumſpectè agatis*), firſt, that in tythes, oblations, obventions, mortuaries, when they were propounded under thoſe names, the king's prohibition ſhould hold no place, altho' for the long with-holding thereof they might be eſtimated at a ſum certain: but it was declared, if a clerk or religious man ſell his tythes, when gathered in his barn or otherwiſe, to any one for money, if the money was demanded before a ſpiritual judge, the king's prohibition ſhould lie; for by the ſale, the ſpiritual goods were made temporal, and the tythes turned into chattels (*c*). Secondly, it was anſwered, if there was a conteſt about a right to tithes founded upon a right to the patronage, and the quantity of ſuch tithes amounted to the fourth part of the goods of the church, a prohibition was to lie, if the cauſe was brought before the ſpiritual court; which alluded to the writ of *Indicavit*, that has been ſo often mentioned (*d*). If a prelate enjoined a pecuniary penalty for an offence, and that penalty was demanded, the king's prohibition was to lie; but if the prelates impoſed a corporal pain, and the perſon to be ſo puniſhed would, of his own accord, redeem ſuch pain by money, a prohibition was not to lie, if the money was demanded before the biſhop (*e*). Thirdly, it was anſwered, when violent hands were laid upon a clerk, the amends *pro violatâ pace* were to be *coram rege*; thoſe *pro excommunicatione* were to be *coram prælato*, where corporal penance might be enjoined; and if the offender would redeem that by money, paid either to the biſhop or the party grieved, it might be demanded before the biſhop,

(*a*) 2 Inſt. 599, &c. (*b*) Part I. 444. (*c*) Ch. 1. (*d*) Part I. 463.
(*e*) Ch. 2. Part I. 444.

(as

(as before ſaid), and the prohibition ſhould not lie (*a*). Fourthly, the prelates were to have power of correction in cauſes of defamation, notwithſtanding a prohibition (*b*). Moſt of theſe points had been before conſidered by the legiſlature in the ſtatute of *Circumſpectè agatis*.

THE next may be conſidered as the fifth article, and was this: That, on the erection of a new mill, if tithe thereof was demanded by the rector, a prohibition of the following kind uſed to go: *Quia de molendino tali hactenus decimæ non fuerunt ſolutæ, prohibemus, &c. et ſententiam excommunicationis, ſi quam hâc occaſione promulgaveritis, revocetis omninò.* To this it was anſwered, that ſuch a prohibition never iſſued with the king's conſent, and that, in future, it ſhould never go (*c*).

THE ſixth article of complaint was, that when any thing of ſpiritual cognizance had been determined definitively before the ſpiritual judge, and had paſſed *in rem judicatam*, and was not ſuſpended by appeal, and afterwards a queſtion was moved before a temporal judge between the ſame parties, upon the ſame thing; this was not allowed as an exception in the temporal court. To this it was anſwered, that becauſe a matter was diſcuſſed before eccleſiaſtical and temporal judges *diverſis rationibus* (as in the caſe of laying violent hands on a clerk), therefore, notwithſtanding any judgment in the ſpiritual court, the king's court might diſcuſs it, if the party ſhould think proper to bring it there (*d*). The ſeventh article complained, that, when perſons were excommunicated, the king's letter uſed to be ſent to the ordinaries, commanding them to abſolve them by a certain day; or, otherwiſe, that they ſhould appear and ſhew for what cauſe they excommunicated them. To this it was anſwered, that ſuch a letter ſhould not iſſue in future, unleſs where the king's liberty was injured by the excommunication (*e*).

THE remainder of theſe articles was as follows: Eighthly, it was complained, that the barons of the exchequer, not content with claiming for themſelves the privilege of not anſwering to any complaint out of that court, extended it to their clerks, in office there, who were called either *ad ordines* or *ad reſidentiam*; and that they inhibited dioceſans from calling them to judgment, ſo long as they were in the exchequer, or in the king's ſervice. To this it was anſwered, that it was the king's pleaſure, that ſuch clerks as attended in his ſervice ſhould, if they offended, be corrected by their ordinary, as other perſons; but that ſo long as they were occupied about

(*a*) Ch. 3. (*b*) Ch. 4. (*c*) Ch. 5. (*d*) Chap. 6. (*e*) Ch. 7.

the

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the exchequer, they ſhould not be bound to reſidence: and it was further added, by the direction of parliament, that it had been uſed, time out of mind, for the king's clerks who were employed in his ſervice, during the time of their ſervice, not to be compelled to keep reſidence at their benefices (*a*); and there was a writ, intitled, *De non reſidentiâ clerici regis* (*b*). The ninth complains, that the king's officers, as ſheriffs and others, entered into the fees of the church to make diſtreſſes, and ſometimes took the parſon's beaſts in the king's highway, where they had no land but ſuch as belonged to the church. To this it was anſwered, that ſuch diſtreſſes ſhould not in future be made, either in the king's highway, or in the ancient poſſeſſions of the church, but only in ſuch as were newly acquired to the church (*c*). A ſimilar proviſion, as to diſtreſſes in the highway, had been made by the ſtatute of Marlbridge (*d*); and as laymen were intitled to an action upon that ſtatute, the parſon might have an action on this for diſtraining in the highway.

The tenth article of complaint was, that when perſons fled to a church, and abjured the realm, according to the cuſtom of the realm, laymen, or their enemies, would purſue them, and take them, if they were out of the king's highway; ſo that they were hanged or beheaded, as perſons who had broke the condition of their abjuration; and while they were in ſanctuary, in the church, or church-yard, they were kept ſo cloſely by perſons in arms, that they could not go forth on the calls of nature, or to provide themſelves with victuals. To this it was anſwered, that thoſe who abjured the realm, were, ſo long as they continued in the common way, in the king's peace, and ſhould not be diſturbed by any one; and while they were in the church, their keepers were not to continue in the church-yard, unleſs ſome neceſſity, or the danger of an eſcape, required it; and while they were in the church, they were not to be driven to the neceſſity of flying from thence, but ſhould be ſupplied with what they wanted, and be permitted to go out on their occaſions. The king was willing, likewiſe, that thieves or appellors might, when they pleaſed, confeſs their offences to prieſts; but confeſſors were to take care that they did not erroneouſly inform ſuch appellors. The eleventh article complains of ſome inſtances in which religious men had long been oppreſſed, and which were provided againſt by a ſtatute made at the beginning of the laſt reign (*e*). The king now anſwered, that the ſaid ſtatute ſhould be obſerved: and the like remedy was to be purſued in caſes of corodies and

(*a*) Ch. 8. (*b*) Reg. 58. b. (*c*) Ch. 9. (*d*) Part I. 345. (*e*) Part I. 372.

penſions,

penſions, obtained by compulſion, whereof no mention was made in that ſtatute (*a*).

THE twelfth article ſays, that if any of the king's tenure was called before the ordinary out of the pariſh where he lived, and was excommunicated for manifeſt contumacy, and, after forty days, a writ iſſued to take them, ſuch perſons would pretend a privilege that they ought not to be cited out of the town or pariſh where their dwelling was; and for that reaſon, the king's writ for the taking of them was denied. To this it was anſwered, that it never was, nor ever ſhould be, denied (*b*). The thirteenth article prayed, that ſpiritual perſons preſented by the king to church-benefices (if refuſed admiſſion by the biſhop, either for want of learning, or other reaſonable cauſe), might not in ſuch caſes be under the examination of lay perſons, as had been lately attempted, contrary to the canons, but ſhould ſue for redreſs to the ſpiritual judge. To this it was anſwered, that the ability of a parſon preſented to a benefice was to be examined by the ſpiritual judge; and ſo the law had always been (*c*). The fourteenth prays, that elections to vacant dignities might be free. To this it was anſwered, that the ſtatutes made in ſuch caſe ſhould be obſerved, alluding to the ſtat. 3 Ed. I. ch. 5. (*d*).

THE two remaining articles relate to the immunity claimed for the perſons of clerks in caſes of felony. The fifteenth ſays, tho' a clerk ought not to be judged before a temporal judge, nor any thing done againſt him that concerns life or member, yet temporal judges cauſe clerks fleeing to a church, and perhaps confeſſing their offences, to abjure the realm, and admit their abjuration; ſo that, tho' they could be their judges, they yet put them in danger of death, if after ſuch abjuration they were found within the realm. To this it was anſwered, that a clerk fleeing to a church for felony, ſhould not, if he affirmed himſelf to be a clerk, be compelled to abjure; but, on yielding himſelf to the law of the land, ſhould enjoy the eccleſiaſtical privilege as had long been uſed (*e*). The ſixteenth article was on the like cauſe of complaint; and ſtates, that tho' a confeſſion of a crime before a perſon who was *non judex* ſhould not be good, nor ſufficient to ground proceſs and ſentence upon; yet ſome ſecular judges admitted clerks who were not liable to their juriſdiction, charged before them of theft, robbery, and homicide, to confeſs their offences, and accuſe others (that is, become provors), and then would not deliver ſuch provors to the ordinary, when demanded, tho' the judge acknowledged he had no authority to condemn them.

(*a*) Ch. 11. (*b*) Ch. 12. (*c*) Ch. 13. (*d*) Part I. 373. Ch. 14. (*e*) Ch. 15.

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them. To this the king anſwered, that the privilege of holy church, when demanded in due form by the ordinary, ſhould not be denied (*a*); ſo that clerks were not to be compelled to abjure, nor were to loſe their clergy by becoming provors.

In this manner was the grand queſtion between the eccleſiaſtical and temporal courts, as it were, compromiſed, by mutual conceſſions, upon a foot on which it has ſtood ever ſince with very little alteration; the proviſions of this act being the rule by which moſt of theſe points were afterwards governed, as may be ſeen in the ſubſequent Part of this Hiſtory.

Sheriffs to be nominated by the judges.

In the ſame year there was a material alteration made in the old judicial conſtitution, by transferring the appointment of ſheriffs from the election of the people to a nomination by the judges. It was complained, that great damage had been ſuſtained by the king, and great oppreſſions by the people, owing to the inſufficiency of ſheriffs and hundredors, by which was meant *bailiffs* of hundreds: it was therefore enacted, by ſtat. 9 Ed. II. ſt. 2. in order to avoid the like in future, that ſheriffs ſhould be aſſigned by the chancellor, treaſurer, barons of the exchequer, and juſtices; and that none ſhould be ſheriff, unleſs he had ſufficient land within the county, of which he was ſheriff, to anſwer to the king and his people. Further, that nobody who was ſteward or bailiff to a great lord ſhould be made ſheriff, unleſs he was out of the ſervice, ſo as to be able to attend to execute the office of ſheriff. It was alſo enacted, that hundreds, whether they belonged to the king or to others, ſhould be kept by convenient and able perſons, who had ſufficient land within the ſame hundred, or the county in which the hundred was; and they were to be aſſigned by the chancellor, treaſurer, barons, and juſtices, as above mentioned. Hundreds were to be lett to hundredors at a reaſonable rent, ſo that they need not be driven to extortion, in order to pay an outrageous ferm; but no ſheriff or hundredor was to leaſe his office to another, in ferm or otherwiſe. The execution of all writs which came to the ſheriffs was to be done by the hundredors ſworn and known in the county, unleſs there was any default in the hundredors, and then by other perſons meet and ſworn, in order that people might know to whom to ſue ſuch executions. This ſtatute was ſent to all the ſheriffs of England, accompanied with a writ, commanding them to cauſe it to be read *in pleno comitatu*, and to be obſerved in all points, as was the common mode of publiſhing ſtatutes; beſides which precaution, it was ſealed with the great ſeal, and ſent to the treaſurer and barons of the exchequer, and juſtices of both benches, that they might maintain it in all points.

(*a*) Chap. 16.

THE *ſtatutum de vicecomitibus, et aliis de viridi cerâ*, 14 Ed. II. contrived a ſhorter proceſs in the exchequer to compel ſheriffs to make acquittances to the king's debtors; and gives ſome direction for ordering the twenty-four jurors in attaints. This ſtatute alſo was ſent by a writ to the juſtices *ad placita coram nobis tenenda aſſignatis*, and alſo to thoſe of the bench, and the treaſurer and barons of the exchequer.

To return to the order of time from which we are digreſſing. In the 10th of the king there is the ſtatute of *Gavelet*, as it is called. *Gavelet*, or *Gaveletum*, is explained to be *a leaſing, or letting, to pay rent*; and *conſuetudo de Gavelet* was when, upon a rent or ſervice being with-held, denied, or detained, a forfeiture of the tenement followed. This was originally the general law of feuds; but being elſewhere ſoftened into a diſtreſs, remained only the cuſtom in Kent, where lands were held in *gavelkind*; and there, when no diſtreſs could be found on the land, the lord might ſeize the land itſelf in the nature of a diſtreſs, and keep it a year and a day; within which time if the tenant came and paid his rent, he was admitted to his tenement; if not, the lord might enter and enjoy it *(a)*. The preſent act was to introduce the like practice into the city of London; for which purpoſe it ordained, that where a perſon had rents iſſuing out of tenements in the city of London, and ſuch rents were in arrear, he might diſtrain ſo long as any thing was to be found in the fee; and if there was nothing which could be diſtrained, then the tenant might be impleaded *de gavelet* by a writ *de conſuetudinibus et ſervitiis*. If he denied the ſervices, the plaintiff ſhould immediately name his *ſecta*, that is, two witneſſes, whoſe names were to be enrolled, and they to have a day to produce them at the next huſtings; and if the witneſſes then proved, *de pleno viſu et auditu*, that the plaintiff had at any time received the rents demanded, the tenant was to loſe his fee by the award of the court, and the plaintiff recover the tenements in demeſne. If, in the above way, they refuſed to acknowledge the ſervices, and likewiſe the arrears, the arrears were to be doubled by judgment of the court, and the tenant give to the ſheriff for the wrongful with-holding one hundred ſhillings, if he was worth ſo much. If the tenant did not come in upon due ſummons, in the huſtings, then the fees were to be delivered to the plaintiff in full huſtings, to be held for a year and a day; within which time if the tenant came, and offered to ſatisfy the plaintiff for the arrears in double, and the ſheriff for his amerce-

Statute of Gavelet.

(*a*) Termes de Ley.

ments, as before mentioned, then he was to have his tenements again; but after the year and day the lands were, by judgment of court, to remain to the lords of the fees in demeſne for ever: the ſame where tenants acknowledged the arrears, and were not able to make ſatisfaction.

THE principal ſtatutes of this king which have not yet been mentioned, are the ſtatute of York, 12 Ed. II. ſt. 1.; the ſtatute of eſſoins, 12 Ed. II. ſt. 2.; the ſtatute of Carliſle, 15 Ed. II.; and the *prærogativa regis*, 17 Ed. II.

IT was deſigned by the ſtatute of York, 12 Ed. II. ſt. 1. to ſupply the defect of ſome former laws relating to the adminiſtration of juſtice. It was found inconvenient that tenants in aſſiſes of novel diſſeiſin could not make attornies; it was therefore ordained that they ſhould have that power, with a ſaving, however, of the liberty to plead by bailiffs if they pleaſed, as had been the cuſtom heretofore (*a*). Again, it was *agreed*, ſays the ſtatute, that when a charter, quit claim, acquittance, or other writing was denied in the king's court, wherein witneſſes were named, proceſs ſhould be awarded to cauſe ſuch witneſſes to appear, as had before been uſed; ſo as if none of them came at the grand diſtreſs returned, or if it was returned that they had nothing, or that they could not be found, yet the taking of the inqueſt ſhould not be deferred by the abſence of ſuch witneſſes; and if the witneſſes came in at the great diſtreſs, and the inqueſt, for ſome cauſe, remained untaken, the witneſſes that came in ſhould have the ſame day given them as was aſſigned for taking the inqueſt; at which time if the witneſſes did not appear, the iſſues that were firſt returned upon them were to be forfeit. The taking of an inqueſt was not to be delayed on account of the abſence of witneſſes living within franchiſes where the king's original writ did not run (*b*).

AN alteration was made in the order of taking inqueſts by *niſi prius*. We have ſeen what alteration had been made in this eſtabliſhment by ſtat. 27 Ed. I. ch. 4. (*c*), directing that inqueſts ſhould be taken before any juſtice of the place aſſociating with him ſome *knight* of the ſhire, if they had not need of great examination. But it was now directed, that inqueſts and juries in pleas of land that required not great examination, ſhould be taken in the country, before a juſtice of the place where the plea was, aſſociating with him a (*d*) *ſubſtantial man* of the country, knight or other; ſo that a certain day be given *en bank*, and a certain day and place in the

(*a*) Ch. 1. (*b*) Ch. 2. (*c*) Part I. 416. (*d*) *Prod' home.*

country,

country, in the preſence of the parties, if the demandant prayed it. As to inqueſts and juries in pleas of land that required great examination, they were to be taken in the country, in the above way, before *two juſtices* of the bench *(a)*; and the juſtice or juſtices were to have power to record nonſuits and defaults in the country, at the day and places aſſigned, as before mentioned. What they had done in the above places, was to be reported in bank at a day certain, there to be enrolled, and judgment to be given. However, it was not meant that ſuch inqueſts and juries ſhould not be taken in bank, if they came: it ſhould ſeem, the practice now had become for the *venire facias* ſometimes to be made returnable in bank, preceding the going of the juſtices; and then, upon the default of the jurors in bank, a *habeas corpora* or *diſtringas* iſſued to cauſe them to come before the juſtices in the country. It was enacted, this ſtatute ſhould not extend to great aſſiſes. Further, it was enacted, that a juſtice of the one bench or the other, aſſociating to himſelf *(b)* a ſubſtantial man of the country, knight or other, at the *requeſt* of the plaintiff, ſhould take inqueſts upon pleas moved by attachment and diſtreſs, and have power to record nonſuits, as above mentioned, and take inqueſts upon defaults there made. As to aſſiſes of *darrein preſentment*, and inqueſts to be taken on writs of *quare impedit*, they were to be ordered according to the ſtatute of Weſtm. 2d. *(c)*; and, beſides, the juſtices were to have power to record nonſuits and defaults in the country, and to give judgment thereupon, as they did in the bench, and report what they had done in the bench, where it was to be enrolled. If it happened that the juſtices did not come into the country at all, or not at the day aſſigned, yet the parties and the jurors were to keep their day in bank *(d)*; that is, the day of return of the *venire facias*, or *habeas corpora*, according as the inqueſt was to have been taken in the country, upon the one or the other.

COMPLAINT had been made, that the returns of writs by bailiffs of franchiſes were ſometimes changed after they had come into the ſheriff's hands. To prevent this, it was ordained *(e)*, that an indenture ſhould be made of ſuch returns, in the name of the bailiff and ſheriff; and if any ſheriff changed a return ſo delivered, and was convicted thereof at the ſuit of the lord of the franchiſe (ſhould he have ſuffered any damage or ſcandal thereby), and at the ſuit of the party who had ſuſtained any loſs thereby, he was to be puniſhed by the king, and yield double damages to the lord and

(*a*) Ch. 3. (*b*) *Prod' home.* (*c*) Part I. 415. (*d*) Ch. 4. (*e*) Ch. 5.

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the party grieved. It was alſo ordained, that ſheriffs and other bailiffs who received the king's writs returnable in court, ſhould put their own names with the returns, that the court might know of whom they had ſuch returns; and if the name was left out, he was to be grievouſly amerced.

THE laſt chapter *(a)* of this ſtatute very wiſely directs, in order to prevent the abuſe of office, that no one who had the office of keeping the aſſiſes of wines and victuals, ſhould, while attendant on that office, deal in ſuch articles. This act is deſerving of notice, as it directs a method of proſecution which has ſince been adopted in many ſimilar caſes, of breaches of a poſitive ſtatute. It directs, that if any one is convict thereof, the merchandiſe ſhould be forfeited to the king, and the third part of it given to the perſon at whoſe ſuit the treſpaſſor was attainted; and in ſuch caſes, a perſon who would ſue for a thing ſo forfeited, was to be received; and the chancellor, treaſurer, barons of the exchequer, juſtices of one bench and the other, and juſtices aſſigned to take aſſiſes, were to receive ſuch plaints, *with writ or without*, and determine upon them.

THESE are the regulations made by the ſtatute of York, which, like that of Lincoln, was tranſmitted to the ſheriffs and juſtices for their direction, and alſo to the chancellor of Ireland, to be enrolled in the chancery there, and to be ſent to the different places, that is, the king's courts, and the ſeveral counties, to be obſerved in all points the ſame as in England *(b)*.

Eſſoins.

THE ſtatute of eſſoins, 12 Ed. II. ſt. 2. declares in what caſes eſſoins were to lie, and in what not *(c)*. It declares, that an eſſoin lay not where the land was taken into the king's hands, nor where the party was diſtrained by his lands; nor where any judgment was given thereon, if the jurors came; nor where the party was ſeen in the court. An eſſoin *de ultra mare* lay not where the party had before been eſſoined *de malo veniendi*; nor where he had eſſoined himſelf another day; nor where the ſheriff was commanded *quòd faciat ipſum venire*. An eſſoin *de ſervitio regis* would not lie where the party was a woman, unleſs ſhe was a nurſe, a midwife, or commanded by writ *ad ventrem inſpiciendum*; neither did it lie in a writ of dower, becauſe it ſeemed to be in deceit and delay of right: nor did it lie for that the plaintiff had not found pledges *de proſequendo*; nor where the attorney

(*a*) Ch. 6. (*b*) Vid. ſtat. Pickering. (*c*) N. B. The original and tranſlation of this ſtatute differ in ſome paſſages which are tranſpoſed, and ſome which are in the latter are not to be found in the former: theſe differences are noted in Ruffhead's edition. I have followed the tranſlation.

was

was eſſoined; nor where the party had an attorney in the ſuit; nor where the eſſoiner confeſſed he was not in the king's ſervice; nor where the ſummons was not returned, nor the party attached, for that the ſheriff had returned *non inventus*; nor where the party had been another time eſſoined *de ſervitio regis*, and had not put in his warrant; nor where he was reſummoned in an aſſiſe of *mortaunceſtor*, or *darrein preſentment*, nor becauſe ſuch a one was not named in the writ; nor where the ſheriff was commanded *quòd attachiet eum*; nor where the biſhop was commanded to cauſe a party to appear; nor for that the term was paſſed. An eſſoin *de ſervitio regis* was allowed after the *grand cape* and *petty cape*, and after diſtreſſes taken *per terras et catalla (a)*.

Of levying fines.

THE ſtatute of Carliſle *de finibus*, 15 Ed. II. is a writ, rather than a legiſlative act, directed to the juſtices of the bench, for their government in taking fines. It ordains, that all parties, whether demandant or plaintiff, tenant or defendant, who would acknowledge or render their rights or tenements to another, in pleas of *warrantia chartæ*, covenant, or other, in which fines were levied, ſhould, before the fines paſſed, appear perſonally before the juſtices, ſo that their age, idiotcy, or any other defect, might be judged of and diſcerned by them: provided, that ſhould any one, either by age or *impotence decrepit (b)*, or ſome caſual debility, be ſo oppreſſed and detained as not to be able to come to court, then two, or one of the juſtices, by aſſent of the reſidue of the bench, ſhould go to the party ſo diſeaſed, and receive his acknowledgment in the plea upon which the fine was to be levied. If there was only one juſtice, he was to take with him an abbot, a prior, or a knight, a man of good fame and credit; and they by a record were to certify the juſtices of the bench of the matter: and fines ſo levied were to have the effect given to fines when levied according to the directions of ſtat. 18 Ed. I. ſt. 4. *(c)*

RESPECTING the appointment of attornies in general, it was ordained by the ſame inſtrument, that none of the barons of the exchequer, or juſtices, ſhould admit any attornies, except only in pleas that paſſed before them and their companions, in bank, and in places where they might be aſſigned; and the ſame power of admitting attornies was denied to the clerks and officers of the barons and juſtices; and all admiſſions in future by ſuch perſons were

(a) The Engliſh tranſlation of this ſtatute contains ſome things that are not in the Latin, as that about the biſhop's proceſs. (b) *Ætate decrepitâ.* (c) Part I. 449.

declared

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declared void. There was a reſervation to the chancellor and the chief juſtice of their authority to admit attornies, as formerly.

The ſtatute prærogativa regis.

THE *prærogativa regis*, 17 Ed. II. ſt. 1. is a parliamentary declaration of thoſe prerogatives which by law reſided in the king, and which have been already mentioned in different parts of this Hiſtory. We ſhall mention theſe in the order in which they ſtand in the ſtatute. It is in the firſt place declared, that the king has the cuſtody of all lands belonging to thoſe who hold of him *in capite per ſervitium militare*, of which the tenants were ſeiſed in their demeſne as of fee, the day they died (of whomſoever they held elſe by the like ſervice, ſo that they held of antient time any land of the crown), until the heir came of lawful age; except the fees of the archbiſhop of Canterbury, the biſhop of Durham between *Tine* and *Tees*, fees of earls, and barons in the marches, where the king's writs run not, and whereof the ſaid archbiſhop, biſhop, earls and barons ought to have the ward, though they held of the king in ſome other place *(a)*. The king was likewiſe to have the marriage of an heir within age and in his ward; whether the land of ſuch heir had belonged to the crown of long continuance, or came by reaſon of ſome eſcheat into the hands of the king, or he had the marriage by reaſon of the wardſhip of the lords of ſuch heirs, without any reſpect to the priority of feoffment, although they held of others *(b)*.

THE king was to have *primer ſeiſin*, after the death of ſuch as held of him *in capite*, of all lands and tenements whereof they were ſeiſed *in their demeſne as of fee*, of what age ſoever the heirs were, taking the iſſues of the ſaid lands and tenements, until the uſual inquiſition was taken, and till he had received homage of ſuch heir *(c)*. The king was to aſſign dower to widows, after the death of their huſbands that held *in capite*, tho' the heir was of full age, if the widows pleaſed: and before aſſignment of dower, ſuch widows were to ſwear that they would not marry without the king's licence, whether the heirs were of full age or not; and if they married without licence, then the king was to take into his hands, by way of diſtreſs, all ſuch lands and tenements which they held of him in dower; tho' the king or the wife was not to take the iſſues of the lands, till ſhe or her huſband ſatisfied the king by paying a fine. In the time of Henry III. this fine was at moſt one year's value of the dower. Moreover, all women, of whatever age, who held of the king in chief, were to ſwear not to marry with-

(a) Ch. 1. (b) Ch. 2. (c) Ch. 3.

out

out the king's licence; and if they did, their lands and tenements were in like manner to be taken into the king's hands till they redeemed them by fine (*a*).

If an inheritance held of the king *in capite* deſcended to ſeveral parceners, all the heirs were to do homage to the king; and it was ſo to be divided, that every parcener ſhould hold his part of the king (*b*). If a woman, during the life of her anceſtor who held *in capite* of the king, was married before ſhe was marriageable, then the king was to have the ward of the body of the ſame woman until ſhe was of age able to conſent; at which time ſhe might chuſe whether ſhe would have him with whom ſhe was married, or him that the king would offer. None who held of the king *in capite* by knight's ſervice might alien more of his land than that the reſidue ſhould be ſufficient to anſwer his ſervice, unleſs he had the king's licence for ſo doing; but this was not underſtood of the members and parcels of ſuch land (*c*). As to the alienation of ſerjeanties without the king's licence, the king had uſed to rate ſuch ſerjeanties at a reaſonable extent to be made of them, and on that foot it is left by this ſtatute (*d*).

It was declared, that where another preſented to a church that was of the king's advowſon, and a ſuit aroſe thereon; if the king recovered by award of the court, tho' after ſix months from the time of the avoidance, that ſhould not prejudice him, ſo as he preſented within ſix months (*e*). Of this prerogative there is no mention in any writer before this ſtatute, tho' it might be underſtood under the maxim of *nullum tempus occurrit regi*.

In the two following chapters the king's right to the cuſtody of idiots and lunatics is declared. Theſe prerogatives are not mentioned by Bracton, but Britton ſpeaks of the cuſtody of idiots (*f*); tho' he ſays nothing of lunatics, of whom we hear nothing till this ſtatute. In the time of Henry III. perſons of both theſe deſcriptions had a *tutor* or *curator* appointed, tho' it does not appear who had the appointment. However, it was now declared, that the king ſhould have the cuſtody *fatuorum naturalium*, of *natural fools*, taking the profits of their lands without waſte or deſtruction, and ſhould find them neceſſaries: this comprehended all perſons, of whomſoever they might hold their fees. After the death of ſuch natural fools, he was to reſtore the land to the right heirs, ſo that ſuch perſons might not alien, nor

(*a*) Ch. 4. Vid. 9 Hen. III. ſt. 1. c. 7. and 32 Hen. III. c. 46. (*b*) Ch. 5. Vid. 14 Hen. III. and 52 Hen. III. c. 9. Part I. 187. 342. (*c*) Ch. 6. Vid. Part I. 183. (*d*) Ch. 7. (*e*) Ch. 8. (*f*) Fol. 167.

their

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their heirs be diſinherited (*a*). Thus far of *natural fools*, or *idiots*. Again, when any one who once had his memory and intellects ſhould become *non compos mentis*, as thoſe who have lucid intervals, in ſuch caſe the king was to provide, that their lands and tenements ſhould be kept without waſte and deſtruction; and that the perſon and his family ſhould live and be maintained in a competent manner out of the iſſues thereof, and the reſidue be kept for their uſe, to be delivered to them when they recovered their memory. In the mean time, ſuch lands and tenements were not to be aliened, and the king was to take nothing to his own uſe; and if the party died in ſuch ſtate, the reſidue was to be diſtributed *pro animâ* by the advice of the ordinary (*b*).

The king's ancient prerogative to have wreck of the ſea was declared, as alſo to have whales and great ſturgeon taken in the ſea, or elſewhere within the realm, except in certain places privileged by the king (*c*).

In the twelfth chapter, there was a proviſion concerning the eſcheats of Normans. King John was the laſt duke of Normandy, under whom that province was loſt. King Henry III. as appears by the latter clauſe of this chapter, recovered ſeveral eſcheats of land within this realm holden by Normans; who, after they began to adhere to the French king, the king's enemy, and ſo were conſidered as traitors, forfeited all their lands to the king, of whomſoever they were held. However, in ſuch caſes, if the king had given thoſe lands to any other, he could not by law give them to hold of himſelf, but of thoſe of whom they were before holden; and ſo king Henry III. had made all his grants. It was now declared, that under ſuch terms the eſcheats of Normans ſhould continue to belong to the king (*d*).

It was declared, that where any one holding of the king *in capite* died, and his heir entered into the land before he had done homage and received ſeiſin, he ſhould gain no freehold by ſuch entry; and therefore, if he died ſeiſed during that time, his wife ſhould not be endowed of ſuch land, as had lately been determined in the caſe of Mathilda daughter to the earl of Hereford, and married to Maunſel the earl marſhal; who, after the death of William earl marſhal of England, took ſeiſin of the caſtle and manor of *Scrogril*, and died in the ſame caſtle before he had entered *by* the king, and done homage to him; upon which it was adjudged, that the widow ſhould not be endowed, becauſe the huſband had not entered *by* the king, but *by intruſion*. But this ſame doctrine was not to hold in ſoccage (that is, common ſoccage), and other ſmall tenures (*e*).

(*a*) Ch. 9. (*b*) Ch. 10. (*c*) Ch. 11. (*d*) Ch. 12. (*e*) Ch. 13.

It was declared, that the king ſhould have eſcheats of lands of the freeholders of archbiſhops and biſhops, if attainted of felony during the vacancy of the ſee, while the temporalties were in the king's hands; which lands the king might give at his pleaſure, ſaving to ſuch prelates the accuſtomed ſervices (*a*). Reſpecting the king's grants, it was ordained, that when the king gave or granted land, or a manor *cum pertinentiis*, without expreſs mention, in the charter or writing, of knight's fees, advowſons of churches, and dowers when they fell, belonging to ſuch manor or land, it ſhould be conſidered that the king reſerved theſe things to himſelf; tho' it was held otherwiſe at common law, and ſtill continued ſo in the caſe of common perſons (*b*).

It was, conſiſtently with the common law, declared, that the king ſhould have the goods of all condemned felons and fugitives, whereſoever they were found; and their freehold was to be taken into the king's hands, who was to have the profits for a year and a day, with the liberty to waſte and deſtroy its houſes, woods, and gardens, and all manner of things belonging to the ſame land, excepting in caſe of perſons in certain places privileged by the king. After the king had had his year-day and waſte, then the land was to be reſtored to the chief lord of the fee, who might have had it before, if he had fined to the king for the year-day and waſte. The ſtatute ſays, that in the county of Glouceſter there was a cuſtom for the lands and tenements of felons, after the year-day and waſte, to revert to the next heir, to whom they ought to have deſcended if the felony had not been committed: and ſo in Kent, where, ſays the ſtatute, the maxim was, *the father to the bough, the ſon to the plough*. This cuſtom of Kent was further recogniſed as to the deſcent of lands, namely, that heirs male ſhould divide the inheritance, the ſame as women; but that women ſhould not divide with men. A woman after the death of her huſband was to be endowed of a moiety; and if ſhe committed fornication in her widowhood, or took another huſband, ſhe was to loſe her dower (*c*).

These are the prerogatives of the crown, which it was thought convenient to aſcertain and ſettle by a ſolemn declaration in parliament. It is probable there were many other claims, which were either not generally admitted, or too well known to need any declaration of them.

There are two other ſtatutes of the ſame parliament: one intitled, *Modus faciendi homagium et fidelitatem*; the other, *De terris Templariorum*, by which

(*a*) Ch. 14. (*b*) Ch. 15. (*c*) Ch. 16.

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the lands and poſſeſſions of the knights Templars, whoſe order was then diſſolved, were transferred to the knights of St. John of Jeruſalem.

Of homage and fealty.

THE *Modus faciendi homagium et fidelitatem*, 17 Ed. II. ſt. 2. preſcribes the method of doing homage and fealty, much in the way that has been before ſtated out of Bracton (*a*). It directs, that when a freeman did homage to the lord of whom he held his chief meſſuage, he ſhould hold his hands together between the hands of his lord, and ſay thus: "I become your man from this "day forth for life, for member, and for worldly honour, and will owe you "faith for the lands that I hold of you, ſaving the faith that I owe unto our "lord the king;" and if he did it to any other than his chief lord, he was to add, "and to mine other lords." When he did fealty, he was to hold his right hand upon a book, and ſay, "Hear you, my lord *R.* that I *P.* ſhall "be to you both faithful and true, and will owe my fidelity unto you for "the land that I hold of you, and lawfully ſhall do ſuch cuſtoms and ſer-"vices as my duty is to you, at the terms aſſigned. So help me God and all "his ſaints!" When a villein did fealty to his lord, he was to hold his right hand over the book, and ſay, "Hear you, my lord *A.* that I *B.* from "this day forth unto you ſhall be true and faithful, and ſhall owe you fealty "for the land that I hold of you in villenage, and ſhall be juſtified by you in "body and goods. So help me God and his holy ſaints!" It is probable, the above regulation was not a parliamentary act, any more than that in the 18th year of the king, called the ſtatute for view of *frankpledge*, which contains thoſe articles of enquiry which were within the cognizance of that juriſdiction, as the *capitula itineris* did thoſe within the cognizance of the eyre. The other ſtatutes of this king relate to the *Deſpencers* and *Gaveſton*; one is for revoking an eſtabliſhment of the houſhold that had lately been made 11 Ed. II. and the ſtatute of *eſtreats* 16 Ed. II. relating to the ordering of thoſe matters in the exchequer.

THUS have we gone thro' the ſtatutes that are by univerſal conſent aſcribed to the reign of Edward II.; at the end of theſe there are thrown together in the ſtatute-book ſome acts, the dates of which are not exactly agreed upon by all, except that they were made either in the reign of Henry III. Edward I. or Edward II. and are therefore uſually claſſed under the denomination of *Statuta incerti temporis*. As ſome of theſe muſt have had a very important effect at the time they were made, it will be proper to notice them, that the conſequences which after followed may be aſcribed to their true cauſes.

Statuta incerti temporis.

(*a*) Part I. 209.

AMONG

AMONG theſe ſtatutes is the ſtatute of *Ragman de juſticiariis aſſignatis*, by which particular juſtices were aſſigned *to hear and determine* in caſes of outrage, treſpaſs, barretry, and the like; which commiſſion was probably the ſame as was called *Traillaſton*; and if ſo, this ſtatute properly belongs to the time of Edward I. (*a*) There is another ſtatute upon the ſubject of adminiſtering juſtice in the country, intitled, *Statutum de juſticiariis aſſignatis*; which ſeems, from the recital at the opening of it, to have been paſſed very ſoon after the 13 Ed. I. as it was made in aid of the proviſion for taking inqueſts in the country by juſtices of *niſi prius*. It ſtates, that the juſtices of both benches, and the juſtices itinerant, had not time to come into the country at the ſeaſons appointed by that act; and therefore the king, willing that juſtice ſhould be had with all diſpatch, ordained eight juſtices to take aſſiſes, juries, and certificates, thro' the whole kingdom; for which purpoſe it was divided into four circuits. Two of theſe juſtices were to go into *Yorkſhire*, *Northumberland*, *Weſtmoreland*, *Cumberland*, *Lancaſhire*, *Nottinghamſhire*, and *Derbyſhire*; two into the counties of *Lincoln*, *Leiceſter*, *Warwick*, *Stafford*, *Salop*, *North' Rotel'*, *Glouceſter*, *Hereford*, and *Worceſter*; two into *Cornwall*, *Devon*, *Somerſet*, *Dorſet*, *Wilts*, *Southampton*, *Oxford*, *Berks*, *Suſſex*, and *Surrey*; two into *Kent*, *Eſſex*, *Hertford*, *Norfolk*, *Suffolk*, *Cambridge*, *Huntingdon*, *Bedford*, and *Bucks*. Aſſiſes, juries, and recognitions of the county of *Middleſex* were to be taken before the juſtices *of the bench*, that is, of the court where the iſſue depended (*b*). Theſe eight juſtices were ſpecially to attend to taking aſſiſes and certificates *aſſiduè per totum annum*, without any regard to the times preſcribed in the before-mentioned ſtatute, in any part of the county that ſeemed to them moſt convenient and proper; and no writs of aſſiſe, juries, or recognitions, were to be granted before any other juſtices, *niſi de ſpeciali gratiâ regis* (*c*). It does not appear how long this eſtabliſhment of juſtices continued.

ANOTHER ſtatute contains the oaths to be taken in the eyre by the ſheriff, his bailiffs, the four hundredors, and the twelve jurors, much in the way in which it had been ſtated by Bracton. One of theſe ſtatutes is intitled, *De magnis aſſiſis et duellis*, tho' it has rather the appearance of the note of ſome lawyer, than a legiſlative act. It ſays, that battail, or the grand aſſiſe, ſhould not lie between relations till they had paſſed the third degree, whenever they claimed by the ſame deſcent; but battail might be joined between brothers where one was infeoffed, and the other claimed by deſcent of the heritage.

(*a*) Part I. 486. (*b*) Part I. 38, 39. (*c*) Part I. 492.

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Battail might be joined, but there could be no grand aſſiſe where a man was infeoffed, and vouched to warranty a charter which he had of his feoffor; for the vouchee might deny the charter *per corpus* of his free man; and in ſuch caſe no grand aſſiſe would lie. On the other hand, a grand aſſiſe would lie, but not battail, where a man ſold land to another, and that other ſold it to another, and no longer having the land, reſtored the charter by which he was infeoffed; after which the heir of the firſt feoffor came and impleaded him by writ of right: here he could not defend his ſeiſin *per corpus* of his free man, but muſt put himſelf *upon God and the great aſſiſe.* However, neither the battail nor grand aſſiſe would lie, where the demandant claimed to hold in frank-marriage, free burgage in gavelkind, and in other ways; as where he demanded only a ſmall thing, as an acre, or toft; and in ſuch caſes they might, by award of the juſtices, put themſelves by conſent on a jury of twelve free men, in lieu of the grand aſſiſe.

A SIMILAR fragment of old law is intitled, *Statutum de viſu terræ, et eſſonio de ſervitio domini regis.* This declares, that a view ſhould not be granted in a writ *de cuſtodiâ*, in a writ *de conſuetudinibus et ſervitiis*, or in one *de advocatione eccleſiæ*, unleſs where there were more churches in one vill of the ſame ſaint; nor in a writ *de dote aſſignandâ*, or *nuper obiit.* Again, the eſſoin *de ſervitio regis* was not to lie in a writ of novel diſſeiſin, in a writ of dower *unde nihil, ultimæ præſentationis*, and appeal *de morte hominis.*

IN another, called *Statutum pro tenentibus per legem Angliæ*, the law of ſuch tenants is ſtated as it is in Bracton, as the *ſtatutum de catallis felonum* ſtates the law reſpecting the lands and chattels of felons before conviction (*a*). Among the ſtatutes *incerti temporis* is one, intitled in the Engliſh, *Articles againſt the king's prohibition*; being, in fact, a tranſlation of the latter part of the ſtatute of *circumſpectè agatis*, the ſubſtance of which, however, is in the former part of that ſame ſtatute. Another is intitled, *Prohibitio formata de ſtatuto articulorum*; being a writ of prohibition directed to the biſhop of Norwich, or his official, with a view probably of enforcing the regulations made by the ſtatute of *circumſpectè agatis*, that biſhop having given occaſion to that act (*b*).

THE remainder of theſe ſtatutes are, *an ordinance for bakers*; *conſuetudines et aſſiſa de foreſtâ, ſive articuli de attachiamentis foreſtæ*; *ſtatutum armorum ad torniamenta*; *compoſitio ulnarum et perticarum*; *ſtatutum de Judaiſmo*; *de diviſione denariorum*; *an ordinance for meaſures*; none of which are of any great mo-

(*a*) Part I. (*b*) Vid. ant.

ment.

ment. *Statutum de brevi de inquiſitionibus concedendo de terris ad manum mortuam ponendis*, has been ſuppoſed to belong to the 20 Ed. I. This act directs, that the writ of inquiſition (by which was meant the writ of *ad quod damnum*) ſhould not be granted for amortiſing lands, but that ſuch alienations ſhould be done only by petition in full parliament. We have ſeen (*a*) that this writ was afterwards authoriſed by parliament for this very purpoſe of aliening in mortmain.

HAVING noticed the few alterations made in the law by ſtatute during this reign, let us ſee what was done by our courts. Whatever might have been the doubt, in the time of Bracton and Fleta, about the ſucceſſion of the half blood, we find in this reign the eſtabliſhed rule of deſcent was, that the half blood ſhould be entirely excluded in the ſucceſſion to land (*b*). In the fifth year of this king (*c*) it was put to the bench by one of the counſel, in the following manner: What do you ſay to the imperial law (*d*), upon which the law of the land is founded, which ordains, that the heritage ſhall go to the moſt worthy; *quòd poſſeſſio fratris facit ſororem hæredem?* to which the court aſſented; and in the ſame place it is ſtated in the very terms of the law as held at this day, that if the brother dies, and the ſiſter enters, the land ſhall rather eſcheat to the lord, than deſcend to another ſiſter of the half blood: "and "this (ſays the book) is the common law, which ought not to be changed." Accordingly, in the caſe then before the court, they determined that the land in queſtion ſhould go to the uncle, and not to the ſiſter of the half blood. This now became the law, as well in lands deſcended as thoſe taken by purchaſe, reſpecting which in Bracton and Fleta we have ſeen there was a difference. After this the courſe of deſcent referred a claimant no further than to the perſon laſt ſeiſed; and it became the rule, without any exception, that *ſeiſina facit ſtipitem*; that is, that the ſeiſin of the laſt poſſeſſor was to be taken for preſumption of his being of the blood of the firſt purchaſer, without inveſtigating a deſcent, which, in many caſes, had become totally obſcured by length of time.

Poſſeſſio fratris, &c.

IT ſeems to have been very early taken for law, that warranty with aſſets would bar the iſſue in tail (*e*), but not warranty without aſſets: thus was a method already propoſed of getting looſe from the tie of an entail. But notwithſtanding this, there appear conſtructions and limitations of entails, which ſhew an inclination to extend the ſtatute *de donis* to the utmoſt. It

Gifts in tail.

(*a*) Part I. 453. (*b*) Indeed it is ſo ſtated in Britton, ch. 19. (*c*) 5 Ed. II. Mich. 148. S. P. Ibid. 628. (*d*) *La ley impiel.* (*e*) 4 Ed. II. 107.

was

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was determined, that the heirs, as well as the firſt donee, were reſtrained from alienation; and that the word *heirs* was left out of the ſtatute by miſtake of the clerk (*a*). The concluſions as to deſcent upon that ſtatute which we took notice of in the former reign, went no further than to eſtates in tail *general*, that is, where the limitation was to a man and the *heirs of his body*. However, where a gift was to a man and ſome *ſpecial* heir of his body, particularly deſcribed, it was nothing more than a conſequence from former principles, that ſuch limitations ſhould be enforced by the ſtatute. A gift to a *man and his wife and the heirs of their two bodies begotten*, and to a *man and the heirs he ſhall beget of the body of ſuch a woman*, were two inſtances of ſuch *ſpecial* tails in this reign (*b*).

In 5 Ed. II. (*c*) the ſecond wife claimed dower out of an eſtate in ſpecial tail to her huſband and his heirs by a former wife; and in ſupport of this claim it was contended, that the ſtatute only reſtrained the tenant from alienation, but could not prevent the attachment of a lawful right. To this it was anſwered, that the tenant never had a fee in him, nor was any more than a joint feoffee; beſides, the ſtatute which requires that the land ſhould deſcend to the heir ſpecified by the deed of gift, or revert to the donor, virtually took away this claim of dower, as a ſort of alienation that would ſo far prejudice the iſſue.

Probably, ſoon after Fleta wrote, the writ of *formedon in remainder* was invented; for we find one in the ſecond year of Edward II. (*d*), ſo that there was now the diſtinction between a *remainder* and a *reverſion*; and a *remainder* was conſidered as a technical term of limitation, altogether requiſite in the wording of the donation. In the eighth year of this king (*e*) a queſtion aroſe upon a gift in remainder of land to *J. S.* in tail, and *for default of iſſue to W. N. habendum* in tail: it was doubted whether this was good without the word *remainder*; and it was held ſufficient, becauſe the former gift in remainder to *J. S.* was extended to both.

The moſt intereſting part of that knowledge which is furniſhed by the reports of this reign, conſiſts in the progreſs made towards bringing into form the remedies lately invented for redreſſing injuries to land or perſonal property. Of theſe we ſhall begin with writs of formedon.

Of writs of formedon.

Writs of formedon became in this reign very common, being ſpecific remedies to carry into effect the proviſions of the ſtatute *de donis*. Theſe were

(*a*) 5 Ed. II. Bro. Tail, 72. (*b*) 17 Ed. II. 555. (*c*) P. 139. (*d*) P. 40.
(*e*) Bro. don. & rem. 38.

of

of three kinds: one was a formedon *in deſcendre*; another, a formedon *in reverter*; another, *in remainder*. The formedon *in deſcendre* was ordained, and the form thereof given by the ſtatute, which alſo ſpeaks of the formedon *in reverter* (not indeed under that name, but by the deſcription of a writ whereby the donor was to recover after failure of heirs) as common enough in the chancery; tho', as we obſerved before, there is no mention of ſuch a writ, nor probably did it exiſt in Bracton's time (*a*). The form of a formedon *in reverter* differed from that *in deſcendre* only as the two caſes differed. It was *Præcipe*, &c. *quòd juſtè*, &c. *manerium de Bloxham cum pertinentiis, quod Robertus de Grelley dedit Petro de Grelley ad totam vitam ſuam, et quod Thomas filius et hæres prædicti B. frater ejuſdem Johannæ, cujus hæres ipſe eſt, conceſſit Iſolde de Grelley, habendum poſt mortem prædicti Petri eidem Iſolde et hæredibus de corpore ſuo exeuntibus, et quod poſt mortem prædictorum Petri de Iſolde præfatæ Johannæ* REVERTI *debet, per formam donationis et conceſſionis prædictorum, eò quòd prædicta Iſolde obiit ſine hærede de corpore ſuo exeunte*, &c. (*b*) The formedon in *remainder* was a writ that had originated ſince the ſtatute, and was founded upon the diſtinction that had lately been made between a reverſion when to a donor and when to a third perſon; which in the latter caſe was now called a *remainder* (*c*). The writ, therefore, in conſequence of this diſtinction, uſed in ſuch caſes to alledge, inſtead of *quæ* REVERTI, *quæ* REMANERE *debet*. We find this writ, ſo early as the ſecond year of this king, to be a ſettled form of demanding land (*d*).

THE formedon *in deſcendre*, as it came in the place of a mortaunceſtor, which was before the ſtatute the only remedy the heir *per formam doni* had, was in ſome points conſidered in the light of that writ. It was looked upon as a writ of poſſeſſion; and, as ſuch, it was held, the demandant muſt make himſelf heir to the perſon laſt in poſſeſſion (*e*). It was argued, that as it would be a good plea for a tenant in mortaunceſtor to ſay, that the perſon laſt ſeiſed died ſeiſed of nothing but a fee tail; ſo, in this writ, it would be good to ſay he died ſeiſed of a fee ſimple (*f*). This writ was held to lie for an infant as well as for a perſon of full age, not only becauſe it was a writ of poſſeſſion, of which any one might avail himſelf, but alſo becauſe it was expreſly ordained by a ſtatute, which makes no exception of perſons within age (*g*). The general plea in this and the other formedons was, *ne dona pas*. It was once pleaded in a formedon *in deſcendre*, that the donor was not ſo ſeiſed as to

(*a*) Part I. 411. (*b*) Pa. 473. (*c*) Pa. 311. (*d*) Pa. 40. (*e*) Pa. 390. (*f*) Pa. 431. (*g*) Pa. 16, 150.

be

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be able to make a gift. To this it was objected, that there was no need of enquiring in this action about the ſeiſin or title of the donor, but that the tenant ſhould only ſay, *ne dona pas:* then the tenant amended his plea, and ſaid, he could not make a gift *ſans ceo*, that he was ſeiſed ſo as to confer a ſeiſin; but it being ſtill inſiſted that the donor's title was not to be enquired into, one of the juſtices directed *ne dona pas* to be entered on the roll (*a*).

A FORMEDON *in reverter* was conſidered as a writ of poſſeſſion; and therefore where it lay a ſeiſin ſo far back as the time of king Richard, like a writ of right, it was held ill; and it was ſaid, that it ſhould be limited to the time of a writ of ael or mortaunceſtor (*b*). However, tho' a writ of poſſeſſion, it was held that an infant could not have it, becauſe it lay at common law, and was not ordained by ſtatute, as the formedon *in deſcendre* was (*c*). A formedon *in remainder* was conſidered in the ſame light as the former. An objection was made to a writ of formedon *in remainder*, and the clerks of the chancery were ſent to, who ſaid it was the uſual form of the chancery to make the demandant in ſuch writ heir to the perſon laſt ſeiſed, and to no other; but they could give no reaſon for it (*d*).

IT was not unuſual in a formedon for the tenant to plead, that an anceſtor of the demandant aliened with warranty to ſuch a perſon from whom the land deſcended to the tenant; and to argue upon this, that it would be abſurd for the demandant to claim under the entail as againſt the tenant, when he was bound by the warranty of his anceſtor to defend the tenant in poſſeſſion of that very land againſt all the world. To this plea it was common for the demandant to admit the deed of his anceſtor, but to ſay, that aſſets did not come to him by deſcent from his anceſtor, and therefore he ought not to be bound by it; and if, upon trial of this iſſue whether he had any value by deſcent from his anceſtor, it was found that he had, the warranty was held a bar to the action (*e*). That a warranty ſhould bar the heir from claiming againſt his anceſtor's deed, is perfectly conformable with the old law; and as the ſtatute *de donis* had only declared that a fine ſhould not bar, but ſeems to have left an eſtate tail open to the effects of a warranty, it was nothing more than a concluſion of law, that an eſtate tail, even after the ſtatute, might be barred by a warranty; but the ſingularity is, that this warranty was reſtricted ſo as to loſe its effect, if not accompanied with aſſets by deſcent. There ſeems no other way of accounting for this novelty, but by ſuppoſing that the judges thought it more conformable with the old law and the ſpirit of the

(*a*) Part I. pa. 506. (*b*) Pa. 37, 38. (*c*) Pa. 389. (*d*) Pa. 625. (*e*) Pa. 45. 564. 641.

ſtatute,

ſtatute, to chuſe this middle way, pointed out by a regulation of the ſtatute of Glouceſter concerning alienations of tenants by the courteſy, which declares that a warranty of the father ſhould not bar the heir without an inheritance deſcending *ex parte patris* (*a*). Whatever might be the reaſon, it was held ſo early as the ſecond year of this king, that warranty with aſſets would bar the heir in tail, but not otherwiſe.

THAT they had an eye to the ſtatute of Glouceſter in queſtions of entails and warranty, ſeems probable from the following caſe: A tenant *par la ley* had alienated with warranty, and his heir brought a *formedon*. To this a warranty was pleaded; and in reply, the ſtatute was ſet forth; and it was alledged there was nothing by deſcent, therefore the warranty was of no force. To this it was objected, that he could not avail himſelf of that ſtatute, becauſe it was confined to the writs mentioned therein; namely, to writs of mortaunceſtor, ael, cofinage, and beſael. But it was anſwered, that in like manner as another chapter of that ſtatute, which gives the writ of entry *in caſu proviſo*, was conſtrued to extend to alienations by tenants for life and *per legem*, tho' the ſtatute only mentions tenants in dower; ſo on this chapter might *any* writ be maintained that was grounded on the alienation of the huſband: and it was accordingly adjudged, that the writs named in the ſtatute were only for examples, and a writ of formedon, or right, would be equally good (*b*). Thus, if a formedon *in deſcendre*, which was ſpecially aſſigned by ſtatute for the iſſue in tail, was allowed as a remedy in a caſe within the ſtatute of Glouceſter, there ſeemed to be an affinity acknowledged, which might well warrant the application that is above ſuppoſed to be made of that ſtatute.

WE are now enabled to ſee the nature and tendency of ſome other writs, which have hitherto been mentioned only generally.

THERE were at common law two writs for the recovery of the right of wardſhip; that called *De communi cuſtodiâ*, and that *De tranſgreſſione*, for ejectment of ward; neither of which are diſcourſed of by any author of the preceding ages; but all the knowledge we have of them is confined to two ſtatutes which make ſome regulation for their conduct and proceſs (*c*). One of thoſe ſtatutes ordained the writ of *raviſhment of ward*, which did not lie at common law (*d*). All theſe three writs were in uſe during this reign; and we are enabled, from ſome few deciſions, to collect their diſtinct office. It ſeems the *writ of ward* was, in its nature, a writ of right, and was

Other real writs.

(*a*) Part I. 398. (*b*) Pa. 324, 325. (*c*) Part I. 439. (*d*) Part I. 438.

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brought for the mere right, before any ſeiſin of ward had been attained (*a*): in this action the defendant might pray in aid, and vouch to warranty, as in other real ſuits, but the proceſs was that of diſtreſs (*b*). The writ of *ejectment of ward* lay where a ſeiſin had been obtained, and the plaintiff had been ouſted thereof; and, like the former, it lay both for the land and the body of the ward (*c*). The writ of *raviſhment of ward*, which was given by the 2. Weſtminſter, c. 35. (*d*) was only to recover the body; and this, like the former, only lay where there had been a ſeiſin, and the plaintiff was deprived of his ward: however, it was held, that the defendant ſhould not be permitted to traverſe the ſeiſin, but muſt plead the general iſſue of *ne raviſt point* (*e*). This was an action of treſpaſs as well as the former, and therefore it was thought that the writ ſhould be laid *vi et armis*; and tho' it was ſaid that it was a ſpecial writ, which by the form in the ſtatute was only *contra pacem*, and accordingly one laid *vi et armis* had been once held ill (*f*), yet, upon re-conſideration, it was determined to be good (*g*).

The writ of *ceſſavit per biennium* given by 2. Weſtm. c. 21. (*h*) was a very common remedy, being recurred to in failure of a diſtreſs. The pleading in this action was ordered in conformity with that for which it was in ſome caſes a ſubſtitute (*i*). Thus, tho' a ſeiſin of the ſervices in queſtion was alledged, it was not ſufficient for the tenant to ſay *ne unque ſeiſi* of the ſervice, no more than in an avowry, but he was to anſwer to the tenure, or it would be taken for granted (*k*); ſo that the general plea was, *nous ne tenons rien de lui* (*l*). It was allowed, that the defendant might alledge, by way of *proteſtation*, that the ſervices were leſs than what were demanded; and for *anſwer* ſay, that there was ſufficient diſtreſs upon the land (*m*). A *ceſſavit* being in the nature of a writ of right would never lie againſt a termor for life, except when the reverſioner was plaintiff in the action (*n*). A view was not allowed in this action, becauſe the ceſſer was the defendant's own act (*o*); and tho' the aid of a parcener was refuſed (*p*), that of a reverſioner was allowed (*q*).

There are ſeveral writs of *contra formam feoffamenti* grounded upon the ſtatute of Marlbridge, c. 9. (*r*) The common plea in theſe was, *ne unque ſeiſi*, before the time of limitation preſcribed by that ſtatute (*s*). There appears a writ of a ſimilar deſign with the former, which we have not met with in any of the preceding reigns, called a *monſtravit*, which was in after-times

(*a*) Pa. 378. (*b*) Pa. 213. (*c*) Pa. 376. (*d*) Part I. 438. (*e*) Pa. 378. (*f*) Pa. 168. (*g*) Pa. 191. (*h*) Part I. 435. (*i*) Pa. 361. (*k*) Pa. 195. 560. (*l*) Pa. 61. (*m*) Pa. 534. (*n*) Pa. 643. (*o*) Pa. 38. 61. 195. (*p*) Pa. 38. (*q*) Pa. 245. (*r*) Part I. 342. (*s*) Pa. 51, 52.

more

more frequently termed *monſtraverunt*. This writ was at common law, and was contrived for tenants in ancient demeſne, who had been burdened with more ſervices than were originally due in that tenure. The litigation of theſe points generally produced an iſſue, which was to be determined by Doomſday-book in the exchequer, that being the evidence by which ancient demeſne was to be proved (*a*). The firſt proceſs in this writ was a prohibition (*b*), and then an attachment.

THERE appear ſome few other new actions, grounded either upon the ſtatutes of the two laſt reigns, or the common law. Of the former kind are the writ *de contributione*, on the ſtatute of Marlbridge, c. 9. to compel coparceners to be aiding to the eldeſt in performing the ſervices; on the ſtatute of Glouceſter, c. 7. the writ *in caſu proviſo*; a writ of entry, founded on 2. Weſtm. c. 3. for the heir of the reverſioner, after a recovery againſt his anceſtor by default; a writ *contra formam collationis*, on ſtat. 2 Weſt. c. 41. (*c*). Of the latter kind are the following: the writ of *ſecta ad molendinum*, for recovering a ſuit to a mill, where a lord's tenants had been time out of mind bound to grind their corn at his mill, and any had withdrawn or ceaſed ſuch ſuit; a writ of *quid juris clamat*, for a conuſee in a fine levied by a reverſioner to gain the attornment of the tenant for life; the writ of office called *diem clauſit extremum*, grounded on the ſtatute of Marlbridge, c. 16. which was, where a perſon died ſeiſed of land holden *in capite*, then this writ iſſued to ſeiſe the land into the king's hands (*d*). The proceeding by *ſcire facias* had become very common, owing to the ſanction that had been given to it by a ſtatute in the laſt reign (*e*). The moſt uſual inſtance in which we find it, was to get execution of recognizances and of fines.

THE writ of *conſpiracy*, which had been framed by the king's direction in the laſt reign (*f*), was put in practice as a mode of redreſs for parties who were injured by certain combinations and confederacies. One of the objects pointed out by the ſtatute of Edward I. was evil procurers of dozeins: under that idea this writ was ſometimes proſecuted againſt indictors; and tho' in ſupport of ſuch writs it was argued, that a procurer of indictments had only to get himſelf impannelled on the jury, and then he would eſcape the imputation of *unlawful* confederacy, yet it was more than once held that it would not lie againſt indictors (*g*). In one inſtance of this kind the defendants pleaded they were jurors, and preſented; upon which iſſue was taken, whether jurors

Writ of conſpiracy.

(*a*) Pa. 280. 455. (*b*) Pa. 422. (*c*) Pa. 101. 67. 91. 515. (*d*) Pa. 81. 86. 304.
(*e*) 2. Weſtm. c. 45. (*f*) Part I. 459. (*g*) Pa. 401. 547.

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or not. It was endeavoured to extend this writ. A writ of conſpiracy was brought againſt ſeveral for ſuing a falſe ſtatute merchant, in order to encumber the land of the plaintiff. It was objected to this writ, that it was not within the ſtatute of conſpiracy, tho' there appears no opinion of the court upon it (*a*). Again, this writ was brought againſt one perſon upon the following caſe: The defendant had brought a writ of entry againſt the plaintiff, which was adjourned during a certain time, upon agreement between the parties; but the demandant in that writ returned to the court, without communicating to the tenant his deſign of going on with the ſuit, and, by ſurprize, recovered by default; and now the tenant in the writ of entry brought this action of conſpiracy againſt the demandant for redreſs. But it was held by the court, that this was under the forms of law, and could not be called a falſe alliance, confederacy, and colluſion; therefore that the writ would not lie, but the party muſt ſeek redreſs by demanding the land back again in a writ of right (*b*). It was held, that a writ of conſpiracy would not lie againſt women, tho' no reaſon is given for ſo ſingular an opinion (*c*). The count upon the writ uſed to conclude, *ad grave damnum ipſius W. et contra formam ordinationis, &c. unde dicit quòd deterioratus eſt, et damnum habet ad valentiam* ——, *et inde producit ſectam, &c.* (*d*) Where a writ was brought by a baron and feme, and it laid the damages *ad damnum ipſorum*, it was held ill (*e*). In ſuch a writ againſt conſpirators for procuring an indictment, it muſt alledge that the plaintiff was *acquitted*, otherwiſe it would be ill (*f*); and it was held, that all writs of conſpiracy ſhould be laid againſt the ſtatute.

A SIMILAR writ to the foregoing was the writ of *deceit*, of which we find no mention till this reign, tho' it was founded on the common law. This was to redreſs a perſon in damages for any injury he had ſuſtained by reaſon of colluſive, oppreſſive, or deceitful proceedings in judicial matters. It was brought for levying a fine falſely, and ſuggeſting a falſe title; for ſuing a *monſtravit*, where the plaintiff was not in ancient demeſne; againſt the demandant in an action and the ſheriff for not ſummoning the tenant, ſo that he loſt his land by default; againſt one for ſuing falſely in a writ of waſte, and not properly ſummoning him, ſo that he loſt his land (*g*).

Action of debt.

WE ſhall now view the improvement made in the more common perſonal actions then in uſe. We have ſeen, that the action of debt, in the reign of Heny II.

(*a*) Pa. 81. (*b*) Pa. 172. (*c*) Pa. 509. (*d*) Vid. Pa. 401. a record in conſpiracy down to the award of the *venire*. (*e*) Pa. 347. (*f*) Pa. 509. (*g*) Pa. 104. 214. 245. 587. 681.

was

was the remedy for recovering money, or a chattel *(a)*, and that in the reign of Edward I. *(b)* this action began to be ſplit into two; ſo that a writ of *debet* was appropriated principally to caſes where money was to be recovered, and a writ of *detinet* for recovery of chattels. This diſtinction was ſtill attended to; but the cloſe affinity between theſe two modes of demanding was ſuch, that they were ſometimes included in the ſame writ: Thus we find an action *quòd reddat* 20l. ARGENTI *quas ei* DEBET, *et dimidium* SACCI LANÆ *quam ei injuſtè* DETINET *(c)*. However, debt and detinue muſt be conſidered as two actions, and the ſpecific differences ſhall therefore be treated of ſeparately.

IT ſeems that a writ of debt was uſually grounded upon a *deed*, or *obligation* to pay money; which was a *writing ſealed*; though it was ſometimes upon a mere bargain of buying and ſelling: but ſo exact were they in their tranſactions at this time, that a deed would be ſometimes made for the price of a thing ſold; in which latter caſe the plaintiff would ſtate his demand of ſo much money as the price of the thing ſold, and then produce a deed teſtifying the tranſaction and the debt *(d)*. If the action was grounded wholly upon a deed of obligation, the plaintiff ſtated that the defendant granted himſelf to owe ſo much money, and then ſhewed the deed teſtifying it: if it was a tranſaction without writing, then, after ſtating the demand, he would offer to produce his *ſecta*, or ſuit, to prove it: and it was no uncommon thing to have a writ containing two demands; one grounded upon a deed, the other not; in which caſe the plaintiff, in counting, would produce the deed to prove one, and his ſuit to prove the other *(e)*.

A DEED made at Berwick was offered as evidence in an action of debt, but was objected to as not legal proof, becauſe the place where it was made was out of the juriſdiction and proceſs of the court *(f)*; which objection was held good, and that it was the ſame of Cheſter and Durham, and *à fortiori* of Ireland and other places beyond the ſea *(g)*. It was held, that a defendant ſhould not be admitted to wage his law againſt a *ſpecialty*, for ſo a deed was ſometimes called; and tho' it was endeavoured to bring a ſealed tally within the ſame reaſon, it was over-ruled *(h)*; yet at the ſame time it was admitted, that in *accompt* againſt a bailiff or overſeer he would not be allowed to wage his law againſt a ſealed tally *(i)*. The reaſon of the difference is not ſtated in the report, nor does it ſeem eaſy to account for it. The proper general plea againſt a deed was, *nient le fait*, that it was not his

(*a*) Part I. 126—134. (*b*) Part I. 475. (*c*) 7 Ed. II. 241. (*d*) Pa. 375.
(*e*) Pa. 78. 188. (*f*) Pa. 24. (*g*) Pa. 613. (*h*) Part I. 469. (*i*) Pa. 178.

deed;

deed; and where it was pleaded by an abbot, *neſt pas lour commune ſeale*, that it was not the common ſeal of the convent, he was driven to ſay, *nient le fait (a)*. A common plea to a deed was *deins age*, not of age, when made (*b*). In an action of debt brought upon an obligation to pay ſo much money, if a book was not returned by ſuch a day, it was pleaded that the book was put at ſuch a place, and the plaintiff took it *ante diem*; to which he replied, he did not take it *(c)*.

RESPECTING joint and ſeveral actions; a huſband brought an action of debt in his own name only, upon an obligation made to his wife while ſole, and it was held good; becauſe if ſhe had been joined, *ſhe* would have recovered the money, and ſo have had a property which ſhe ought not by law to poſſeſs, while under coverture *(d)*. It was laid down as a rule long ſettled, that executors, when plaintiffs, ſhould all be named in the writ; but when a writ was brought againſt executors, none need be named but thoſe who had adminiſtred *(e)*. The way of demanding againſt executors was ſomewhat different from that againſt the original debtor; it was, *quæ prædictus Thomas ei* DEBUIT, *et præd. executores injuſtè* DETINENT *(f)*. The general plea of executors was, *pleinment adminiſtre*; to which the replication was, *aſſez de biens le mort (g)*: that of an heir when ſued on an obligation in which his anceſtor had bound his heir, was, *riens per deſcent*; to which the replication was, *aſſez jour de brief purchaſe*; to which it was rejoined, *navoit rien le jour du brief purchaſe (h)*.

IF there was no writing to prove the demand, the plaintiff was to produce his ſuit, according to the old law; tho' it ſeems there was not now ſo much reliance upon the *ſecta*, or ſuit, as formerly. In the 7th of Edward II. it was demanded by the counſel for the defendant, that the ſuit ſhould be examined, as was the method, we have ſeen, in former reigns *(i)*; but the counſel for the plaintiff objected to it, that *this court* (that is, the common pleas) never ſuffered a *ſecta* to be examined: however, he ſaid he was ready to *aver* the debt, that is, to *prove* it by the verdict of a jury; for ſuch was an averment: and upon one of the juſtices ſhewing ſome doubt about examining the *ſecta*, the averment was received, and the defendant pleaded *riens lour deuſt, nil debet*, and it went to the country for trial *(k)*; however, the ſuit ſtill continued to be brought, tho' their examination might be diſuſed.

(*a*) Pa. 589. (*b*) Pa. 369. (*c*) Pa. 379. (*d*) Pa. 93. (*e*) Pa. 503.
(*f*) Pa. 490. (*g*) Pa. 354. (*h*) Pa. 585. (*i*) Part I. (*k*) Pa. 242.

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In the 14. Edward II. the plaintiff being aſked what he had to ſhew for his debt, ſaid, *a good ſuit*; upon which the counſel for the defendant prayed they might come to the bar, which they did; and then he tendered his averment *que riens, &c.* that he owed nothing *(a)*. The wager of law continued as a proof not only upon the iſſue of *nil debet*, but on ſome collateral points. An action of debt was brought upon a ſpecialty, and it was pleaded, that the obligation was to be void upon the defendant levying a fine after ſonable requeſt, and that no requeſt was made: to this it was replied, that requeſt was made at ſuch a time and place; to which it was rejoined, that he made no ſuch requeſt, which he was ready to prove *par notre ley*, by wager of law *(b)*.

We find actions of debt were brought upon three ſtatutes made in the laſt reign; one upon ſtat. 2. Weſt. c. 11. *(c)* againſt a keeper of a gaol for letting an accountant go at large *(d)*; another on the ſtatute merchant for lettting a debtor by recogniſance go at large *(e)*; another on c. 19. of the ſame ſtatute *(f)*, which directs, that the ordinary ſhould be bound to anſwer the debts of the deceaſed, as the executors ſhould have done. There was an action againſt the executors grounded upon this ſtatute, which after ſome debate was held good: the plea in ſuch actions was, *non devindrent en mains l'ordinary (g)*.

Thus far of the action of debt; next as to that of *detinue*; which might be brought, as was before ſaid, for any chattel that was in the hands of the defendant and belonged to the plaintiff: but as, in the former writ, it was neceſſary in the counting to ſhew *how* the money was owing, ſo in this it was required to ſhew in what manner the thing in queſtion came out of the poſſeſſion of the plaintiff, and into that of the defendant. This was generally by a delivery by the hands of the plaintiff, or of ſome other by his authority, or through whom he claimed, or upon ſome of the terms mentioned at large by Glanville *(h)*, as a loan, depoſit, or the like. As this was the material part of the enquiry, it had become a rule of pleading, that the defendant ſhould not be admitted to deny, or *traverſe*, as they called it, the detinue, but ſhould anſwer to the *delivery*, or *bailment*, that the court might be informed, whether the thing came to the defendant's hands by the bailment of the plaintiff himſelf, or by the hands of ſome other *(i)*. There was a particular reaſon why the plaintiff ſhould ſtate whether the bailment was by his own hands, or by thoſe of another; becauſe in the latter

(*a*) Pa. 420. (*b*) Pa. 433, 434. (*c*) Part I. 419. (*d*) Pa. 341. (*e*) Pa. 138.
(*f*) Part I. 412. (*g*) Pa. 490. (*h*) Part I. 126—134. (*i*) Pa. 545.

caſe

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caſe it was not ſufficient to bring a ſuit, but he muſt ground his action upon a ſpecialty, otherwiſe the defendant need not anſwer it (*a*). Thus, then, the plea in this action was, *ne bailla pas*, or *navoit pas de ſon baille* (*b*). However, in this action as well as in others, they went ſometimes into a length of pleading which put the inquiry upon another matter; as where it was pleaded that the plaintiff accepted ten acres of land in allowance of the goods demanded, and the plaintiff replied, that he was not enfeoffed in recompence of the goods now demanded (*c*).

Detinue de rationabili parte.

THERE are two inſtances where this action, or at leaſt that of debt, was brought, which deſerve particular notice. In the firſt year of this king, a writ, in the *detinet*, was brought by a ſon againſt his father's executors for ten marks of the property of the deceaſed, who died worth thirty; and becauſe by the cuſtom of the country the third part ought to go to the deceaſed, a third to his widow, and a third to his children unmarried, therefore he demanded his third. To this it was pleaded, that he had been advanced by a leaſe of lands from his father of ſuch value, and therefore the action would not lie. The plaintiff admitted this in his replication, but ſaid the land was worth only ſo much, and therefore he ought to maintain his action: however, it was decided againſt him, as this action was grounded wholly upon uſage and want of advancement: ſo that this writ, notwithſtanding what was argued in the caſe, as to the declaration of *Magna Charta* (*d*), was held by the court to be founded on the *particular cuſtom* of a certain place (*e*). Again; we find in the 17th year of this king, when a writ of detinue of chattels was brought by an infant againſt his father's executors, reciting, *cum per conſuetudinem regni*, the mother was to have a third, the children a third, and the executors another third, &c. and the defendant pleaded *pleinment adminiſtre*; one of the juſtices took up the matter, and expreſſed a doubt whether the action would lie: for, ſays he, the writ is founded on a cuſtom, but we know no ſuch cuſtom, and the law is otherwiſe: and when it was urged that the cuſtom was good, as appeared by *Magna Charta* in theſe words, *ſalvis uxori et pueris ſuis rationabilibus partibus ſuis*, he replied, that the Great Charter only ſaved to the children their *own* goods, which might happen to come into the hands of the father; but neither the Great Charter nor the common law reſtrained the father's power over his own effects, to give or deviſe them as he pleaſed. And it was added by another, that he had often ſeen ſuch writs, but never knew

(*a*) Pa. 39. (*b*) Pa. 78. (*c*) Pa. 198. (*d*) Ch. 18. Part I. 186. (*e*) Pa. 9.

one

one of them maintained; ſo the plaintiff was nonſuit (*a*). This was the opinion in the reign of Edward II. reſpecting the power of bequeathing, where a wife and children were left by the teſtator; and agrees with Glanville in ſome reſpect, tho' not wholly; for that author, after ſaying that *ultima voluntas eſſet libera*, ſtates the power of making teſtaments as ſubject to a reſtraint ſimilar to that above ſuppoſed (*b*).

The moſt common ſubject of actions of detinue were deeds and charters, which was owing to the mode then in faſhion of aſſuring land. It was a common practice, when land was lett for years, or other eſtate leſs than the inheritance, to make a charter of feoffment, and bail it to a third perſon, as a ſort of truſtee, who was to return it if the termor enjoyed his term without moleſtation; otherwiſe to be abſolute. Another way was, to make mutual obligations for performance of covenants, and depoſit them in the hands of ſome third perſon, with a power, if one of the parties broke his part of the covenant, to deliver his obligation to the other who had ſuffered by it (*c*). Theſe deeds, if the purpoſe of them had been ſerved, or they became forfeited, uſed to be demanded in actions of detinue, in which the merits of the detainer were diſcuſſed.

The actions of *covenant* that occur in this reign are either for land, or ſome profit or caſualty iſſuing out of, or appertaining to, land. It was laid down, that this action was appropriated for the recovery of a fee ſimple or term, and that even a fee tail had been recovered in an action of covenant (*d*); this, however, muſt have been before the ſtatute. When it was not uſed for the purpoſe of recovering by fine, we find it grounded upon a deed containing covenants. It uſed to be brought for not doing homage and ſervice; not acquitting the leſſor againſt demands which ought to have been provided for by the leſſee; againſt the leſſor for ouſting the leſſee; and the like. It ſeems to have been always founded upon ſome writing.

The writ of *annuity* was frequently recurred to: this action was very common between eccleſiaſtics. The heads of religious houſes would grant to clerks annuities, to continue till they preſented them to ſome preferment, with which they were plentifully endowed. Again, when a clerk was ſo preferred, it was no uncommon thing, if the living was greater than the annuity, or larger than they meant to beſtow, to ſtipulate with him for a grant of ſo much money annually, to reduce it to the value they

(*a*) Pa. 536. (*b*) Part I. 80, 81. (*c*) Pa. 513. 554. b. (*d*) Pa. 603.

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thought proportioned to his merit (*a*). In the latter ſort of annuities it was no uncommon plea to alledge, that the ſubject matter was of a ſpiritual nature, and therefore not proper to be diſcuſſed *in foro ſeculari*; but this plea was always over-ruled (*b*).

THE proper way of counting upon a writ of annuity, if there was no deed, was, after ſtating the title and grant, to alledge a ſeiſin by the hands of the defendant; or, if it was ſo old, by the hands of his predeceſſor, or anceſtor, according to the grant; and alſo by the hands of the plaintiff; *and*, if the caſe was ſo, by the hands of his anceſtor, or predeceſſor, likewiſe. The plea to this was, *nient ſeiſi* (*c*), and the replication, *ſeiſi per le mains le donor*, &c. ſuch a time *avant le jour le brieve purchaſe* (*d*); the title and the ſeiſin being the ground of action. If an annuity had been granted before time of memory, it was held that a deed was not neceſſary, but that it was good by preſcription (*e*). Annuities were ſometimes granted with a clauſe of diſtreſs. It had been endeavoured to make ſuch circumſtance a plea in bar of an action of annuity, as the plaintiff had another remedy; but this plea was always over-ruled (*f*). When a writ of annuity was brought againſt a parſon, he alledged, that as it was charged upon his benefice, he ought to have the aid of his ordinary; which was granted (*g*). A defendant was not allowed to wage his law in an action of annuity (*h*); probably becauſe it was upon a deed, or a preſcription, that was held equivalent to one.

Action of accompt.

THE writ of *accompt*, as it had been aided with a more effectual proceſs by the ſtatute of Marlbridge and Weſtm. 2d. was rendered a very uſeful remedy againſt perſons who acted as agents, and ſo became, either by bailment or receipt, poſſeſſed of the goods, or money ariſing from the goods, of another. The object of this writ was to bring the party *to account*, for which purpoſe auditors were to be aſſigned. The perſons who were the objects of this remedy, as they had violated a truſt of great confidence, and often of great magnitude, were ſubjected to a ſharper proceſs than any others who had broken a mere civil engagement; but the legiſlature had proceeded with tenderneſs in allowing a proceſs againſt the perſon. The ſtatute of Marlbridge (*i*) gave it only againſt a man's *bailiff* (which meant a perſon to whom any thing was *bailed* or entruſted), and only where the bailiff had no lands by which he might be diſtrained. The ſtat. 2 Weſtm. (*k*) went

(*a*) Pa. 224. 416. (*b*) Pa. 634. (*c*) Pa. 221. (*d*) Pa. 205. (*e*) Pa. 665. (*f*) Pa. 8. (*g*) Pa. 416. 524. (*h*) Pa. 309. (*i*) Ch. 23. Part I. 348. (*k*) Ch. 11. Part I. 419.

further,

further, and extended it to all *ſervants*, *bailiffs*, *chamberlains*, and all manner of *receivors*, *who were bound* AD COMPOTUM REDDENDUM; but ſtill it was only to iſſue in the caſe of a defendant having no lands, as directed by the former ſtatute. We find promiſcuouſly the writ of *monſtravit de compoto* made uſe of in this reign, as well as the common *capias* (*a*); for ſo the *habeas corpus* and other writs againſt the perſon were now termed from the words of the writ commanding to take the body; and it was an objection in either caſe to ſay, that the party had land, and therefore ought not to be taken (*b*); though if he had not lands where the receipt was alledged to be, the writ would lie. After theſe ſtatutes, it was uſual, in order to have the benefit of them, to charge defendants either as *bailiffs* or *receivors*. It was ſometimes objected, that the *monſtravit* would not lie againſt a *receivor*, becauſe the ſtatute of Marlbridge ſpeaks only of *bailiffs*; but it was ſaid, and ſo adjudged, that the writ would be good, at leaſt by 2d Weſtm. which ſpoke of *receivors*, and that was to be conſidered as having relation to the ſtatute of Marlbridge: ſo that theſe writs, which had become very common, were determined to be good (*c*).

IF the defendant was charged with being *receivor* of certain money belonging to the plaintiff, the plea might be, *ne unque recievour* (*d*). If the count charged him as *receivor* of ſuch money, and alſo with certain goods which were *bailed* to him; to the firſt he might plead generally, *non receptor*; to the ſecond, that he had accounted (*e*). There is the following inſtance of a ſpecial plea and replication worthy of notice: The defendant ſaid, that he was employed by the plaintiff to buy things at market, of which he every day gave an account, and delivered to him the eſcrows of the expences, and in this and no other way was his receivor or bailiff; and demanded judgment, whether of ſuch receipt and adminiſtration, of which he had rendered account, he ought to anſwer, &c. To this it was replied, that he was receivor in the manner above alledged, *ſans ceo que*, that he had rendered account (*f*). This phraſe of *ſans ceo que* was merely a denial, and correſponded with the Latin one of *abſque hoc quòd*, which was a denial, as *cum hoc quòd* was an affirmation, in the law Latin of thoſe days.

IT was a general plea to ſay, *ne unque recievour* (*g*). Where part of the action was founded upon a deed, and part upon a ſuit, the plea to that upon the deed was, *pleinement account, per patriam*; to the latter, *nient ſon recievour per*

(*a*) Pa. 94. 99. 665. (*b*) Pa. 99. 186. (*c*) Pa. 41. 94. (*d*) Pa. 80. (*e*) Pa. 151. (*f*) Pa. 386. (*g*) Pa. 80.

 legem.

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legem. Again, law wager was only allowed where the defendant was charged with receipt by the hands of the plaintiff, and not, if by the hands of another (*a*). To this, as to all other actions, an acquittance might be pleaded (*b*). We find an action of account againſt a guardian in ſoccage, grounded on the ſtatute of Marlbridge, c. 17. (*c*). The writ here recited the ſtatute, as was uſual in writs warranted by ſtatute only.

Action of treſpaſs.

VERY little has yet been ſaid on the action of *treſpaſs*, all the writers of the former periods being wholly ſilent as to the nature and extent of this remedy: however, there is a record of the reign of Edward I. (*d*) which ſhews that this writ lay for caſes of perſonal injury, and taking of goods and chattels; the writ there mentioned containing a complaint of both. In the preſent reign we find writs of treſpaſs of various kinds; for *battery*, *impriſonment*, *taking and carrying away of goods and chattels*, *breaking and entering lands or houſes*, *reſcuing a diſtreſs*, and the like caſes of violent injury. The manner in which the defendant anſwered to theſe ſuits was, by pleading not guilty, if he could deny the *fact*: if he admitted the fact, but could ſay what would juſtify him in doing it, he then ſtated ſuch matter ſpecially. Thus, in an action for impriſoning the plaintiff, he might ſay, that he was ſeiſed of the plaintiff as his villein, and took him as ſuch; and then the plaintiff might traverſe, that he was ſeiſed of him as his villein: or he might plead he took him on ſuſpicion of killing (*e*). Tho' the ſpecial matter of juſtification was uſually to be ſpecially pleaded, yet where a defendant pleaded not guilty, and the jury found *ſon aſſault demeſne*, judgment was given for the plaintiff, the ſame as if he had pleaded it (*f*). In treſpaſs for taking and carrying away the goods and chattels of the plaintiff, he might juſtify as parſon, and that he took them for tythes; if for cutting trees, that he had right of eſtovers; if for reſcous, that they were *blada creſcentia*, and ſo not liable to a diſtreſs; if for goods, that he took them as guardian in ſoccage; if for driving away cattle, that he took them for ſervices due; if for entering land, that it was his own ſoil and freehold; if for beating down a mound, that it was a nuiſance, and he beat it down while it was freſhly raiſed (*g*). To ſuch and the like pleas of juſtification the plaintiff was to reply, by denying the very point upon which the defence was reſted. As thus: To a plea of taking for tythes in the fee of *L*, the replication was, that he did not take in the fee of *L*, but in the fee of *C*; to a juſtification in right of eſtovers, that they were not appendant to his freehold; to a

(*a*) Pa. 590. 651. (*b*) Pa. 589. (*c*) Part I. 342. Pa. 487. (*d*) Part I. 477. (*e*) P. 412. 344. (*f*) Pa. 381. (*g*) Pa. 12. 22. 63. 135. 198. 302. 312. 326. 340. 400. 422. 458.

plea

plea of diſtreſs for ſervices, replication *a force et armes, et nient per tiel cauſe*; to a *nuiſance freſhement* raiſed, replication that it ſtood a year and a day before it was beat down; to the plea of *our ſoil and freehold*, and title ſet forth, the replication was, *our ſoil, and not his* (*a*); and ſo on.

In an action for beating down a dove-houſe, above alluded to, the defendant pleaded that it was within his ſoil and freehold, and demanded judgment if he ſhould anſwer for abating any thing in his own demeſne. This ſort of pleading was objected to on the other ſide, as *freehold or not freehold* could not come in iſſue in an action of treſpaſs. The plaintiff contented himſelf with averring his declaration: but the defendant then ſet forth his title; after which the plaintiff was driven to reply to the ſpecial matter, namely, *that the defendant beat down the plaintiff's dove-houſe, in the plaintiff's ſoil, and not in the ſoil of the defendant*, which iſſue went to the jury (*b*). And ſo it ſeems to have been ſettled, that the freehold of the plaintiff or the defendant was a good iſſue. When this was agreed on, it muſt be ſeen, that many injuries to land, which uſed in the reign of Henry III. to be tried in the aſſiſe, might be *conteſted* in an action of treſpaſs. In the time of Bracton, every injury that intrenched upon the free enjoyment of a man's freehold was conſidered as a diſſeiſin, and was the ſubject of an aſſiſe; ſeveral of thoſe we have juſt been enumerating, were of that kind, and were now generally litigated in a writ of treſpaſs. It was in the ſpirit of the old law that the above objection was made to the plea of freehold: but this was now growing out of date; and inſtead of bringing an aſſiſe, and afterwards, according as the circumſtances altered upon pleading, turning it into a jury to enquire of the treſpaſs, it had become the practice to bring a writ of treſpaſs in the firſt inſtance (*c*). An aſſiſe and treſpaſs were ſometimes both brought for the ſame cauſe of action: in ſuch an action of treſpaſs, being for entering a houſe, and taking goods and chattels, and cutting trees, it was pleaded that an aſſiſe was depending for the ſame land; and that becauſe damages would be given in the aſſiſe for taking the goods and cutting the trees, the writ of treſpaſs ought not to lie (*d*).

As a *capias* and proceſs of outlawry lay in an action of treſpaſs, there was a temptation to recur to this writ, in preference to an aſſiſe: but yet the proceſs of *capias* was under ſome check; for upon a return of *nihil habet* on the *diſtringas*, the *capias* did not uſe to iſſue without an application to the court to award it (*e*). Aid uſed to be granted in this as in real actions. In an action

(*a*) Pa. 63. 302. 400. 422. 458. (*b*) Pa. 458. (*c*) Part I. 235. 247. (*d*) Pa. 272. (*e*) Pa. 478.

againſt

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againſt a man for cutting trees, on the defendant pleading a right of eſtovers, and the plaintiff replying *non appendant*, and that iſſue being to be tried, the plaintiff *prayed aid* of his wife, becauſe he held the land in her right; and it was granted (*a*).

We find ſome actions of treſpaſs of a particular kind. There is mention of a writ of treſpaſs brought by the king on a *cepit et aſportavit*; to which it was pleaded, that the defendant and his anceſtors had had wreck there from the time to which the memory of man runs not to the contrary. To this they replied, not ſeiſed before time of memory; on which iſſue was joined (*b*). An action of treſpaſs on the ſtatute of Marlbridge, c. 28. by a prior for goods taken during the vacancy of the priory. To this it was objected, that it ſhould be *detinue*, and not *vi et armis*; but the writ was held good (*c*). Another upon c. 2. for diſtraining beaſts of the plough, on the ſtatute *De diſtrictione ſcaccarii* (*d*). An action grounded upon the ſtatute of Marlbridge, c. 15. for diſtraining in the highway, is not treſpaſs; but a ſpecial action reciting the ſtatute (*e*). Thus far of the action of treſpaſs, of which more will be ſaid in the ſubſequent reigns. The common form of commencing a plea in treſpaſs, if any title was to be ſet out, was to deny the force and arms, and then ſhew the ſpecial matter of juſtification; "and ſays, "that as to his coming with force and arms, and whatever is againſt the "peace, he is not guilty; but as to the cutting and carrying away of the "trees," &c. &c. and ſo ſtating the juſtification.

After this ſhort account of actions, it may be expected that ſomething ſhould be ſaid on the method of conducting them in court. It has been before intimated, that the counting and pleading in actions was all done *vivâ voce* in court; but the method in which this was tranſacted we have not been able to obſerve till this reign, when we meet with the firſt *Report* of proceedings in court. From this we may form ſome judgment of a legal diſputation (for ſo the pleading in a cauſe ſeemed) and the ſtyle in which it was *moderated* by the judges. To gratify the reader's curioſity, we ſhall give a ſpecimen of this, with all its formality, ſtrictly adhering to the original report.

Of pleadings and arguments in court.

The firſt is of an action where ſeveral pleas in abatement were over-ruled, and at length the general iſſue pleaded. The prior of *Lenton* brought a writ of treſpaſs, grounded upon the ſtatute of Marlbridge, c. 28. (*f*) againſt the parſon of *Bangor*, &c. *quare vi et armis bona et catalla domûs et eccleſiæ ipſius*

(*a*) Pa. 302. (*b*) Pa. 435. (*c*) Pa. 109. (*d*) Part I. 340. Pa. 583. (*e*) Pa. 624. (*f*) Part I. 348.

prioratûs

prioratûs ad valenciam, &c. ad grave damnum, &c. et contra pacem noſtram, &c. upon which he *counted*, that he took ſome wool and lambs. To this *Herle*, a counſel for the defendant, demanded judgment of the writ, for there was no *one* form of a count for *live* and *dead* chattels; and if he had wanted to count of lambs taken and carried away, he might have ſaid in his writ *quare* AVERIA *ſua cepit et abduxit*. To this *Brab*, one of the judges, ſays, he has counted of wool and lambs, which can be as well *carried* as *chaſed*, therefore *reſpondeas ouſter*. Then *Herle* (taking another ground) ſaid, Again we demand judgment, becauſe he ſays, *bona et catalla domûs et eccleſiæ*, &c. where by right the property of the chattel is not in the church, but in the prior, therefore judgment. To this *Malm.* for the plaintiff, ſaid, Our writ is given by ſtatute, and we have followed the ſtatute, &c.; which was aſſented to, and ſo another *reſpondeas ouſter*. Then *Paſs.* (another counſel for the defendant) ſaid, Again we demand judgment of the form of the writ; for the ſtatute ſays, that a man ſhould have recovery *ad bona repetenda*, and therefore the prior ought moſt naturally, to have a *præcipe quòd reddat* of *detinue* of chattels, or *replevin*, and not this writ, which goes wholly for damages. What then, ſays *Malm.* if the chattels were dead or aliened, ſhould I have no recovery? and there was another *reſpondeas ouſter*. Again, ſays *Herle*, This writ is given by ſtatute to ſucceſſors after the death of their predeceſſors, againſt whom every action for recovery of any thing ought to be brought; and we ſay, that the *prior William*, in whoſe time, &c. is ſtill alive, and therefore we demand judgment of the writ. *Malm.* ſays, He is dead as to this action, for he is depoſed, and ſo the action as againſt him is extinct; and if I was to bring an aſſiſe *quis advocatus*, &c. *ultimam perſonam*, &c. *quæ mortua eſt*, &c. tho' the perſon in queſtion was alive and at the bar of the court, yet if he was no longer parſon, the writ would be good: and (ſays he) put a caſe that a huſband aliened ſome land of the right of his wife, and then was outlawed, and his wife brought a *cui in vitâ*; tho' the huſband was actually alive, yet being dead in law, the writ would not abate. Then *Roub.* one of the juſtices, ſaid, If an abbot brought a writ againſt an abbot, and the defendant was depoſed pending the plea, the writ would not abate; but it is otherwiſe where ſuch an abbot was plaintiff, for then all cauſe of action ceaſed, and therefore he held the writ good in this point: and there was another judgment of *reſpondeas ouſter*. Again, *Paſs.* demanded judgment of the writ, becauſe it was a writ of treſpaſs *vi et armis*, for a wrong done to divers perſons; and the ſtatute does not give a recovery of *damages*, but only *ad bona repetenda*. But *Malm.* argued, the writ was good as it now ſtood, for two reaſons: firſt, becauſe the treſpaſs was done in the time of our predeceſſor,

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predeceſſor, for which treſpaſs we are entitled to our action by the ſtatute; ſecondly, becauſe of the detinue in our time. *Herle.* Your writ has nothing to do with detinue of chattels, but is of a fact done with force and arms to another perſon; ſo that the king would be entitled to a fine for a treſpaſs done in the time of his predeceſſor. *Malm.* (repeating what he had before urged) Suppoſe the chattels were dead or eloigned, I could not recover the things themſelves, and then my action muſt lie in damages, or I ſhould have no recovery at all. *Herle.* Yes, you might recover the value, &c. Then *Weſt*, one of the juſtices, interpoſing, ſaid, The force of their *objection* is, that a man ſhall not recover damages for a treſpaſs done to another; and yet executors may recover damages for a treſpaſs done to another. Again, if waſte is done in the time of my father, I ſhall have an action for the waſte and treſpaſs, &c. In regard to the firſt of theſe caſes, it was obſerved, that the executors recovered not in their own right, but in right of another; and as to the ſecond about waſte, that it was by ſtatute, and not by the common law. However, *Roub.* another juſtice, ſaid, they were all agreed that the writ was good, and therefore awarded another *reſpondeas ouſter*; upon which the defendants pleaded *the general iſſue*, that they did nothing againſt the peace, *preſt*, &c. *et alii e contra*, and ſo iſſue was joined (*a*).

In the above caſe, where there were ſo many pleas in abatement, as they were all over-ruled at the inſtant, they were conſidered as ſucceſſive *amendments*, and none of them were entered on the roll, but only that plea which was finally approved and relied on, namely, the general iſſue. The following is an action where they went on to reply, rejoin, and ſurrejoin. The caſe was this: *Aleyne de Newton* brought his writ of annuity againſt the abbot of Burton upon Trent, and demanded 30l. arrears of an annual rent of 45l. per ann. and he ſaid (that is, counted) that one John, abbot of *Burton*, and predeceſſor of the preſent, did, by aſſent of the convent, grant an annuity to *Aleyne*, payable twice in the year, till he was advanced to a convenable benefice; and he exhibited a ſpecialty, containing, that the abbot by aſſent, &c. did grant an annuity to *Aleyne de Newton Clerk*, in the above manner as he had counted. To this *Willuby* (as counſel for the defendant) prays judgment of the writ, becauſe of the variance between the writ and the ſpecialty; for in the writ he was named *Aleyne de Newton*, but in the ſpecialty, *Aleyne de Newton Clerk*. *Ward* ſaid, that it was no variance; yet *Willuby* maintained, that as he might have had a writ agreeable to the ſpecialty, if he varied in his own purchaſe of it, the writ would be ill; but he could in this caſe have a writ agreeable

(*a*) 4 Ed. II. Trin. Mayn. pa. 109.

to

to his writ. *Ergo*, &c. And again, as far as appears by the ſpecialty, it was made to ſome one elſe, and not to the perſon named in the writ. *Stonore*, one of the juſtices, ſaid, Then you may plead ſo if you will, but the writ is good; therefore *reſpondeas ouſter*. Then ſaid *Willuby*, He cannot demand this annuity, becauſe we ſay, that John our predeceſſor on ſuch a day, &c. tendered him the vicarage of, &c. which was void, and in his gift, in the preſence of ſuch and ſuch perſons, which vicarage he refuſed; wherefore we do not underſtand that he can any longer demand this annuity. *Shard*. We ſay this vicarage was not worth 100 ſhillings; therefore we do not underſtand it to be a *convenable* benefice, ſo as to extinguiſh an annuity of 40l. *Willuby*. Then you admit that we tendered you the vicarage, and that you refuſed it, &c.? *Shard*. As to the tender of a benefice that was not convenable, I have no buneſs to make any anſwer at all. Then *Mutf*. one of the juſtices, aſked, what ſort of benefice they conſidered as *convenable*, ſo as to extinguiſh the annuity? *Shard*. We mean one of ten marks at leaſt. Then *Stonore*, another of the juſtices, ſaid, Do you admit that the vicarage was not worth 100 ſhillings? *Willuby*. We will aver that the vicarage was worth ten marks, *preſt*, &c.; and he has admitted that one of that value ſhould extinguiſh the annuity. *Shard*. And we will aver that it was not worth ten marks, *preſt*, &c. After this iſſue, *Willuby* was deſirous of recurring back to his firſt plea, and ſaid, As you declare that the vicarage was not worth 100 ſhillings, we will aver that it was worth 100 ſhillings, &c. But *Stonore* interpoſed, and ſaid, He declares that the vicarage is worth ten marks; and after that there is nothing to be done, but that the iſſue ſhould be taken on your declaration or his: now it ſeems that it ſhould rather be taken on yours; for, by your plea, you make that a convenable benefice that is worth ten marks, which declaration you ought to maintain, &c. *Willuby*. The mention of the value came firſt from him, when he ſaid it was not worth 100 ſhillings; ſo that it will be ſufficient for me to traverſe what he had ſaid. But *Stonore* preſſing him whether he would maintain his plea, *Willuby* ſaid he would, and pleaded that the vicarage was worth ten marks, *preſt*, &c. *et alii*, that it was not worth ten marks, *preſt*, &c. and ſo iſſue was joined (*a*).

THE pleadings upon the record in the above caſe muſt then have ſtood thus: The defendant ſaid, a vicarage had been tendered and refuſed, and ſo the annuity ſhould ceaſe, judgment of the action. To this the replication was, The vicarage tendered was not worth ten marks, and *ſo* not a convenable

(*a*) 19 Ed. II. Mich. 634. Mayn.

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benefice to extinguish the annuity: rejoinder, it was worth ten marks: surre joinder, it was not. These instances, without troubling the reader with any more, will serve to shew the manner of pleading *vivâ voce* at the bar: every thing there advanced was treated as a matter only *in fieri*, which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust; and where he rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the court, according as it was a point of law or of fact.

The criminal law.

THE criminal law is exhibited by a writer of this reign in a state somewhat differing from that given by any preceding author. The crime of treason is divided in the following way; into *majesty*, *falsifying*, and *treason*. Majesty, or *læse majesty*, is that treason which is directed immediately against the king's person and dignity: as first, those who kill the king, or compass so to do; secondly, those who disinherit the king of his realm by bringing in an army, or compass so to do; thirdly, those who ravish the king's wife, the king's lawful eldest daughter before she is married, being in the king's custody, or the nurse or aunt of the king, being heir to the king (*a*). All these were guilty of the crime of læse majesty. But this author has classed many other offences under this head, which have by construction been drawn into it, and the delinquents involved in the penalties of this high crime. Of this kind he has collected many, which being what he calls perjuries, are, he thinks, properly to be ranked under this offence, because, says he, *every one who commits perjury, lieth against the king*. In pursuance of this notion, he enumerates many misprisions, negligences, abuses, and extortions of office, whether judicial or other, committed by judges or inferior ministers and officers; all which he considers as offences against the majesty of the king, and which merited equal punishment with the before-mentioned defined cases of læse majesty (*b*).

FALSIFYING is either of the king's seal or his money. *Treason* he considers as an offence committed by a private person against another to whom he is bound by ties of blood, affinity, or alliance, which causes his death, disherison, or loss of homage; for the quality of treason, says our author, is, *the taking away of life or member, or decrease of earthly honour, or increase of villainous shame*, which he exemplifies in this manner: The strongest alliance is that of service. If one, says he, whom I have rewarded, who does fealty to me, and

(*a*) Mirror, ch. (*b*) Ibid. sect. 6.

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is ſeiſed in demeſne of a manor; in ſhort, if any one who has a poſſeſſion, rent, vote, church, meat, drink, or other gift from me, falſifies my ſeal, or raviſhes my daughter or my wife, or the nurſe or the aunt of my heir, or doth any thing which is the cauſe of my death, by a felonious compaſſing of the ſame, or to the great diſhonour or damage of my body or my goods, or diſcovereth my counſel, or my confeſſion, which he is charged to conceal; all theſe were treaſon. It ſeems, after all, that what is here called *majeſty* and *falſifying*, conſtitute what we have ſince called *high-treaſon*; and this which he calls ſimply ſo, is what has ſince been denominated *petit treaſon*. The catalogue of treaſons, whether defined or conſtructive, given by this author, makes it unneceſſary to look any where elſe for the reaſons that induced the parliament in the next reign to fix the limits of this crime by ſtatute.

Arson was deſcribed in very comprehenſive terms. *Burners* were thoſe who burnt a city, town, houſe, man, beaſt, or other chattel, felonioufly in time of peace, for hatred or revenge. If any one put a man into the fire, whereby he was burnt or blemiſhed, altho' not killed, yet it was the offence of Arſon, and he was to ſuffer the penalty of it; as were alſo thoſe who *threatened* to burn *(a)*.

It appears by the definition given of *larceny*, that this crime was gradually forming itſelf into the notion we now have of it. Larceny is ſaid to be, *the treacherouſly taking away from another moveables corporeal, againſt the will of him to whom they belong, by evil getting poſſeſſion or uſe of them.* Larceny, ſays our author, could not be committed of goods not moveable, or not corporeal, as of land, rent, advowſon, or the like; and it is ſaid to be done treacherouſly, becauſe if the taker conceived the goods to be his own, and thought he might lawfully take them, it was no offence *(b)*. But if we may credit an author of this reign *(c)*, many things were conſidered as larcenies, which have ſince been looked upon only as cheats and civil injuries: thus bailiffs, receivers, and adminiſtrators, were ſaid to *ſteal* goods, if they did not give in their accounts: falſe weights and meaſures, and other tricks in trade, deceits and impoſitions, are deſcribed as inſtances of larceny.

The offence of *burglary* was alſo very large; for it was not only when a houſe was broken, but the felonious aſſault of enemies in time of peace upon thoſe who were in their houſes, with intent to repoſe there in peace, whether the

(*a*) Mirror, ch. 1. ſect. 8. (*b*) Ibid. ch. 10. (*c*) Mirror.

 aſſault

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assault was with intent to kill or rob, or to beat, was considered as burglary: and altho' such offenders did not accomplish their purpose, yet if there was a breaking, by the assault, of doors, windows, or walls, to enter feloniously, they were guilty of this crime. Those also came within this offence, who feloniously forced their entry into another's house, and did violence against the peace, altho' the house were not broken; and that, whether by day or by night. This extensive description contains in it those notions which constitute the crime of burglary, as now understood, attended with many additional circumstances that were gradually pared off in after-times.

PUNISHMENTS were still various, and in some degree discretionary. Those convicted of *læse majesty* were to be punished according to the ordinance and pleasure of the king *(a)*. Those convicted of *falsifying*, and of *treason*, were to be drawn and hanged. Those convicted of *burning (b)* and rape, were to be hanged *(c)*; and so it was in murder, robbery, larceny above 12d. and burglary, in cases not notorious; but if the offence was notorious, and the party taken in the fact, he was beheaded. Sodomites were to be buried alive *(d)*; and heretics underwent a fourfold punishment, excommunication, degradation, disinheriting, and burning.

INFERIOR punishments not capital were these: mending the highways, causeways, and bridges; setting in the pillory and stocks; imprisonment; abjuration of the realm; exile; banishment, either from the kingdom or some particular town, by prohibiting the entering into or going out of such a place; by ransom; and by pecuniary penalties and fine.

PERJURY which affected the life of a man was punished, as in the time of Edward I. with a mortal judgment, "to the example, says the book *(e)*, "of apparent murderers;" but perjury of a less heinous intent was punished with banishment, either for a time, or for ever; and the woods, meadows, gardens, and houses of the perjured man were to be rased and destroyed, but his heirs were not to be disinherited.

King and government.

THE whole of this unhappy prince's reign was occupied in contests with his barons in defence of his favourites; during which the royal authority and the force of the laws were considerably diminished. The duke of

(*a*) Mirror, ch. 4. sect. 3. (*b*) Ibid. sect. 15. (*c*) Ibid. sect. 16. (*d*) Ibid. sect. 14. (*e*) Ibid. sect. 19.

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Lancaſter, with all his own power, and relation to the perſon of the king, could not obtain a regular and lawful trial, but was condemned by a court-martial to ſuffer the puniſhment of treaſon.

So entirely was this king ſubdued, that he was conſtrained to ſign a commiſſion empowering the prelates and barons to elect twelve perſons, who ſhould have authority for a limited time to make ordinances for the government of the kingdom, which were to have the force of laws. Theſe twelve accordingly framed ſome regulations, which were preſented to the parliament for their confirmation. Some of theſe were, to aſcertain the qualifications of ſheriffs; to aboliſh the practice of iſſuing privy-ſeals for the ſuſpenſion of judicial proceedings; to give damages in caſe of malicious proſecutions; to order the method of making payments in the exchequer; to prevent the adulteration of the coin; and other matters tending to the preſervation of order and good government (*a*).

NOTWITHSTANDING the practice of the late reign, during which the clergy had been ſufficiently humbled, and made amenable to the law of the land; they took advantage of the weakneſs of the preſent government, and ſet on foot their old claims. *Adam de Orgeton*, biſhop of Hereford, was arreſted, and accuſed before the king and parliament of high-treaſon. He there pleaded, that he ought not to anſwer ſuch high matters without the licence and authority of the archbiſhop of Canterbury, who, next to the pope, was his proper judge. Upon the prayer of the archbiſhop and his ſuffragan, he was delivered to the archbiſhop's cuſtody. When afterwards he was brought to the bar of the king's bench, the biſhops came in great form with their croſſes, and took him forcibly from the bar, threatening to excommunicate all who ſhould oppoſe them. Tho' the king afterwards cauſed an indictment to be found by a jury of Herefordſhire againſt this prelate, upon which his temporalties were ſeized into the king's hands, yet the biſhop eſcaped without any other puniſhment (*b*).

THE ſtatutes commencing with *Magna Charta*, and ending with Edward II. together with thoſe called *Incerti Temporis*, it being doubtful to which of theſe three reigns to aſſign them, compoſe what have been called the *Vetera Statuta*; and from the accident of their collection and publication in later times, are ſometimes ſpoken of as the *prima* or *ſecunda pars veterum ſtatutorum*. We have before made ſome obſervations upon the form and ſtile of the *aſſiſæ*, or

Vetera ſtatuta.

(*a*) Brady, App. No. 51. (*b*) Parl. Hiſt. 197.

ſtatutes

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ſtatutes before the reign of Henry III. (*a*) great part of which is equally applicable to thoſe made ſince. The enacting authority is expreſſed by all theſe ſtatutes, as ſubſiſting in the king; who *grants, directs, ordains, provides*, ſometimes by his council, ſometimes by the aſſent of the archbiſhops, biſhops, abbots, priors, earls, and barons; and ſometimes the aſſent of the commonalty is added. In ſome there is not mention of the concurrence of any part of the legiſlature; and in ſome, as in the ſtatute of *Gavelot*, 10 Ed. II. it is ſaid to be provided by the king and *his juſtices*, without any mention either of lords or commons. It is further evident from *The Mirror*, that laws were often made in this latter way; for the author of that book complains, that ordinances are only made *by the king and his clerks*, and by aliens and others who dare not contradict the king, but ſtudy to pleaſe him (*b*). We muſt therefore conclude, that the ſame ideas of legiſlation prevailed now, which were ſtated to have governed in the time preceding the reign of Henry III. (*c*); and that the calling the commons to parliament, as it gave them certainly no greater place there than the lords had before, could not impart to them a greater right to concur in legiſlative acts, than the lords themſelves claimed.

MANY of theſe old ſtatutes do not at all expreſs by what authority they were enacted; ſo that it ſeems the buſineſs of making laws was principally left in the hands of the king, unleſs in inſtances where the lords or commons felt an intereſt in promoting a law, or the king an advantage in procuring their concurrence; and in ſuch caſes probably it was that their aſſent was ſpecially expreſſed.

THERE are ſome circumſtances common to all theſe ſtatutes. All thoſe paſſed in one ſeſſion of parliament are ſtrung together, making ſo many *capitula*, or chapters of one ſtatute; to which is uſually prefixed, a memorandum of the time and place of the meeting of parliament, with the occaſion for calling it. The chapters are ſhort, and the manner of expreſſion very often too general and undefined; offences are looſely and ambiguouſly deſcribed; rarely any certain penalty is inflicted on offenders; they are to be puniſhed at the king's pleaſure, are to make grievous ranſom to the king, and the like; ſometimes the acts are merely admonitory or prohibitory, without affixing any penalties, or preſcribing any courſe of proceſs for hearing and determining the offences. In the time of Henry III. the ſtatutes are moſtly in Latin; in the reign of Edward I. they began to be in French alſo; and the ſtatutes of this reign and of Edward II. are ſometimes in Latin, and ſometimes in French: ſometimes you meet with a chapter in one language

(*a*) Part I. 168. (*b*) Mirr. (*c*) Part I. 168.

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in the midſt of a ſtatute in the other; and in one inſtance there is a chapter partly in French and partly in Latin, namely, the 34th chapter of 2. Weſtm. making rape a felony. It is difficult to account for ſuch remarkable variations as theſe. Some have thought that they diſcovered one rule to prevail thro' theſe ſtatutes; namely, that all ſuch as concerned the intereſts of the church were in Latin; tho' this is confeſſed to be ſubject to ſo many exceptions as almoſt to deſtroy the rule (*a*). Perhaps there was no general principle that governed the legiſlature in chuſing the language of their ſtatutes: both the Latin and French were the languages of the law, and probably were adopted according to the whim of the clerk or other perſon who drew up the ſtatute. In the act above alluded to, as it was the revival of the old law, perhaps the ſcrap of French in which it is worded was taken from ſome law-book in that language, treating upon the ſubject, in its original ſtate; or perhaps it was thought more adviſeable that this article, as it was a repeal of chap. 13 of Weſtm. 1. ſhould be in the ſame language as that ſtatute, tho' the reſt of the 2d Weſtm. was in Latin.

The materials of legal information grow to a greater ſize in this reign than in any of the preceding; for beſides the ſtatutes and judicial records, which begin now to be more numerous and perfect, at this period begin the *Year Books*, or Books of *Years and Terms*, as they were originally called. Theſe contain reports of caſes adjudged from the beginning of this reign to the end of Edward III. and from the beginning of Henry IV. down to the end of Henry VIII. Year Books.

The *Year Books* have been ſo called, becauſe, it is ſaid, they were publiſhed *annually* from the notes of certain perſons, who were paid a ſtipend by the crown for this employment. The eſtabliſhment of Reporters is ſaid to have been firſt made by this king, or more probably at the latter end of the former reign; as it came within the plan of that prince's endeavours to improve our laws, and was the grand means ſo much wanted, that of putting them into writing. However, as we have no fruits of ſuch an appointment till the beginning of this reign, we may ſuppoſe it did not take place till then.

As a record is a conciſe entry of all the real and effective ſteps made in a judicial proceeding, a report is a ſhort note of the progreſs towards making thoſe ſteps; the debate in court concerning ſome of them; the deci-

(*a*) Barr. Obſ. pa. 65.

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ſion upon their propriety and deſign; and the grounds and principle upon which the deciſion was to be ſupported. The reports of this reign, as they were the firſt eſſays in this way, fall ſhort of the clearneſs and fullneſs with which reports have been made in later times. Being minuted down by the reporter in court at the inſtant, as the thing really paſſed, they have in them all the dryneſs neceſſarily attending ſuch a formal memorandum, which is much heightened by the ſtarch manner in which theſe things were uſually then tranſacted in court. The way is this: The action is firſt ſtated; then comes the counſel for the plaintiff, who opens the declaration; he is followed by the counſel for the defendant; and ſo on, till the pleadings on both ſides are brought to an iſſue: and here the report often deſerts you, concluding with the whole that was done that day, without the leaſt intimation what afterwards became of the cauſe. The counſel are ſometimes interrupted by occaſional obſervations, from the bench, on the form and legality of the pleadings; theſe are argued, altered, or amended; then the counſel proceed till ſomething elſe ariſes to draw the notice of the judges. It cannot be denied that this is ſometimes managed with ſufficient acuteneſs, and exhibits often a curious piece of judicial diſputation. This is all done ſhortly, and by fits; without any length of deduction, concatenation of argument, or diſplay of learning. The want of theſe, and the clerical method of the whole, make this firſt attempt at reporting not a very inviting performance to a modern reader.

The Mirror.

THE *Mirror of Juſtices* is a book, the conſideration of which may properly be aſſigned to this reign. It is a ſingular work, and has raiſed much doubt and difference of opinion concerning its antiquity. Some have pronounced it older than the Conqueſt; others have aſcribed it to the time of Edward II. There may perhaps have been a work by this name as early as the date ſuppoſed; but whoever judges from the internal evidence of this book will be ſatisfied, that great part of it is of a period much later, and certainly written after *Fleta* and *Britton*; for it ſtates many points of law, as it were, in a ſtage of progreſſion ſomewhat receding from thoſe writers, and approaching nearer to thoſe of later times. It is probable that *Andrew Horne*, whoſe name it bears, might take up an ancient book of that name, and work it into the volume we now ſee, in the reign of this king, or at the end of the former; and if ſo, whatever it propounds may be conſidered as law in the reign of Edward II.

IT treats of all branches of the law, whether civil or criminal. Beſides this, it gives a curſory retroſpect of ſome changes ordained by former kings; enumerates

enumerates a liſt of abuſes, as the author terms them, of the common law, propoſing, at the ſame time, what he conſiders to be deſirable corrections. He does the ſame with *Magna Charta*, the ſtatutes of *Merton* and *Marlbridge*, and ſome principal ones in the reign of Edward I.

THIS book ſhould be read with great caution, and ſome previous knowledge of the law as it ſtood about his time, he being an author who treats of things with very little preciſion. This, with his aſſertions about Alfred, and the extravagant puniſhments inflicted by that king on his judges, have brought this treatiſe under ſome ſuſpicions. When read with theſe hints, *The Mirror of Juſtices* is certainly a curious, intereſting, and, in ſome degree, an authentic tract upon our old law; tho', conſidering the anachroniſms, if I may ſo call them, in legal knowledge, with which it abounds, blending promiſcuouſly the antiquated law with that of the time in which it was reviſed, and the uncertain date of that reviſion, it is much to be wondered that ſome great writers (*a*) have relied ſo much upon this author, as to pronounce on the antiquity of many articles of our law merely on his authority.

Miſcellaneous facts.

THERE is nothing but tradition to give us any trace of the places where the practiſers and ſtudents of the law had their reſidence before the reign of this king. But in the reign of Edward II. we are informed that ſuch places were called *Hoſtels*, or *Inns of Court*, becauſe the inhabitants of them belonged to the king's courts. There is ſaid to have been one of theſe at *Dowgate*, called *Johnſon's Inn*; another in *Fewter's* (that is, *Fetter*) *Lane*; and another in *Pater-noſter Row*. An antient cuſtom is vouched to ſupport the belief of the laſt being in the neighbourhood of St. Paul's Church, where the ſerjeants and apprentices, each at *his pillar*, uſed to *hear his client's caſe, and take notes thereof upon his knee*; a cuſtom which was remembered by a ſolemnity obſerved in the time of Charles I. upon the making of ſerjeants; for it was then a cuſtom for them to go there in their formalities, and *chuſe their pillar*.

IT is reported, that William *earl of Lincoln*, about the beginning of this reign, being well affected to the ſtudy of the laws, firſt brought the profeſſors of them to ſettle in a houſe of his, ſince called *Lincoln's Inn*. The earl was only leſſee under the biſhops of Chicheſter; and many ſucceeding biſhops, in after-times, lett leaſes of this houſe to certain perſons, for the uſe and reſidence of the practicers and ſtudents of the law (*b*); till in the 28th year of the reign of Henry VIII. the biſhop of Chicheſter granted

(*a*) Coke and Nat. Bacon.

(*b*) Dugd. Or. Jur. 231.

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the inheritance to Francis Sulyard and his brother Euſtace, both ſtudents, the ſurvivor of whom, in the 20th year of queen Elizabeth, ſold the fee to the benchers for 520l. It ſeems clear, that *Thavies Inn* was inhabited at this time by lawyers: and theſe are the firſt Inns of which we have any account that can be depended on (*a*).

The number of ſuits ſo increaſed in the common bench, that whereas there had uſually been only *three* juſtices there; Edward II. at the beginning of his reign was conſtrained to increaſe them to *ſix*, who uſed to ſit in two places; a circumſtance not eaſy to account for (*b*): within three years after, they were increaſed to *ſeven:* next year they were reduced to *ſix*, at which number they continued.

In 17 Edward II. Hervie de Staunton, chancellor of the exchequer, was conſtituted chief juſtice of the king's-bench; and his former poſt was to be executed by deputy while he heard cauſes *in Banco Regis* (*c*).

In the ſixth year of this king (*d*), oyer of a writ being demanded, it was there ſaid by the juſtices, that, as it was purchaſed a long time ago, it was in the Tower of London, and therefore there muſt be a writ out of chancery to cauſe it to be brought at a certain day. While this fact ſhews where the depoſitory of judicial records then was, it alſo accounts, in ſome meaſure, for the great deſtruction and mutilation of our early records, which run great hazards by theſe occaſional removals.

(*a*) Dugd. Or. Jur. 143. (*b*) Ibid. 39. (*c*) Ibid. 38. (*d*) Pa. 190.

CHAP.

CHAP. X.

EDWARD III.

Of Judicature in Ireland—Lancaſter made a County Palatine—The Charters—Of Purveyance—Tenures—Of the Clergy—Of Proviſors—Probate of Wills and Inteſtacy—The Statutes of Labourers—Trade and Commerce—The Statute of the Staple—Foreſtalling—Children born out of the Realm—Of Sheriffs—Judicature in Parliament—in Council—The Court of the Steward and Marſhal—The King's Bench—Error in the Exchequer—Juſtices of Aſſiſe and Niſi Prius, &c.—Attaints—Proceſs of Outlawry—Execution of Writs—Qualifications of Jurors—Law Wager—Statute of Jeofail—Pleadings to be in Engliſh—Statute of Treaſons—Riots—Of Indictments—A Jury de Medietate Linguæ—The Benefit of Clergy—Of Pardons—Proceſs of Capias & Exigent—Origin of Juſtices of the Peace.

THE reign of this king fills a great and diſtinguiſhed ſpace in the hiſtory of our law, whether we regard the ſtatutes that were paſſed, or the deciſions made by the courts. The order of proceedings, both civil and criminal, were amended in many inſtances by ſtatute; and in the courſe of half a century, there was hardly a title or queſtion that did not, at one time or other, undergo ſome diſcuſſion in court. The judicature of parliament and the council, as well as that of inferior courts, was adjuſted; the claims of the clergy were qualified and ſettled; the crime of treaſon defined; juſtices of the peace were eſtabliſhed; the inferior miniſters of juſtice were regulated. Entails and remainders, diſcontinuances and warranty, continual claim, remitter, actions upon the caſe; all theſe were new ſubjects of argument. While theſe novelties were introduced, the old learning was modified, real writs were better underſtood, and perſonal actions more conſidered. Such are the principal heads of inquiry in this king's reign. We ſhall begin with the ſtatutes.

THE great length of this reign, and the frequent ſitting of parliament, contributed to give birth to more acts of legiſlation than are to be found in

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any of the preceding reigns. The ſtatutes being very numerous, and, at the ſame time, multifarious and ſhort, it may be adviſeable, in diſcourſing upon them, to deviate from the method that has hitherto been obſerved; and, inſtead of treating this part of our ſubject chronologically, it will be, perhaps, more conducive to a thorough underſtanding of what was done by the legiſlature towards meliorating our juriſprudence, to digeſt the ſtatutes, according to the object of them, into heads, and then ſpeak upon them in that order which the hiſtory of the ſubject may ſeem to require; ſo that, notwithſtanding the courſe of time may be diſregarded as to the whole, the ſeveral parts will be conſidered as nearly as can be in an hiſtorical way. The ſame method will be followed, for the ſame reaſon, in all the ſubſequent reigns.

BEFORE we come to ſuch laws as concern the rights of perſons and of things, with the adminiſtration of juſtice, it may be convenient to mention ſuch as cannot properly be ranked under either of thoſe heads, or are of ſo important a nature, as to deſerve a ſeparate conſideration. Of this kind are the ſtatutes that relate to the political condition of the king's dominions or authority; thoſe relating to tenures, or to the clergy; the ſtatutes of labourers, and the laws made for the protection of trade and commerce.

Of judicature in Ireland.

OF the former kind is the *Ordinatio pro ſtatu Hiberniæ*, 31 Ed. III. ſt. 4. This, like a ſtatute of the ſame title enacted in the reign of Edward I. *(a)* was made for the correction of certain irregularities in the adminiſtration of juſtice in Ireland. It appears by that act, that Ireland was then furniſhed with courts of record correſponding, and bearing the ſame names, with ours. The two ſuperior tribunals of this kingdom, that of the *parliament* and of the *council*, ſeem to be imparted or confirmed by the preſent ſtatute. Matters of a more important and arduous kind, ſays the act, ſhall be agitated and determined, either in council *per peritos conſiliarios noſtros ac prælatos & magnates, et quoſdam de diſcretioribus et probioribus hominibus* of the neighbourhood where the council happened to be held; or in parliament, *per ipſos conſiliarios noſtros ac prælatos, et proceres alioſque de terrâ prædictâ*, according to the cuſtom and law of the country (*b*). It ſeems, at leaſt from this mention of the council and parliament in judicial matters, that the conſtituent members of each were not aſcertained with any great exactneſs.

THE remaining proviſions of this act were of a very general nature, being chiefly to enforce ſuch laws as had been made in the time of Edward I. and

(*a*) Part I. 366. (*b*) Ch. 2.

had

had been, or were now intended to be, ingrafted on the Iriſh conſtitution; ſuch as the ſtatute of Wincheſter, thoſe againſt maintenance, champerty, and other extortions and mal-practices of miniſters belonging to courts (*a*); and alſo ſome made in this reign, as thoſe againſt purveyors, particularly ſtat. 4 Ed. III. c. 4. (*b*) In the ſame ſpirit which dictated ſome laws to reſtrain the too eaſy granting of pardons in England, it was directed, that the juſticiary of Ireland ſhould not grant pardons of offences but in and with the aſſent of the council or parliament; and pardons were not to be general, but ſpecifying the crime pardoned (*c*). It was ordained, that the mayors and conſtables of ſtaples ſhould not hold plea of things, but according to the ſtatute of the ſtaple (meaning the Engliſh ſtatute) (*d*); nor ſhould any pleas be held in the exchequer againſt the ſtatute, that is, the ſtat. *Artic. ſuper chartas* (*e*). It ſeems the juſticiary of Ireland uſed to go *ſeſſions* or circuits twice a-year, together with others who uſed to be aſſociated with him on the occaſion: theſe were held in every county. It was now directed, that he ſhould once a-year aſſociate with himſelf a prelate and earl, the chancellor and treaſurer, and ſome of the diſcreeter juſtices of the two benches, and barons of the exchequer; and make inquiry into the conduct of other judges, by the oaths of good and lawful men, as well clerks as knights, and certify to the king the reſult of their enquiry (*f*). Theſe were the principal matters contained in this ſtatute; which, while it refers to ſeveral Engliſh ſtatutes with the ſame familiarity as if they were the law of Ireland, without enacting them, or taking notice how or when they were adopted there, intimates, that that country had cuſtoms peculiar to itſelf, directing certain things to be ordered *ſecundum legem et conſuetudinem terræ noſtræ Hiberniæ*. Perhaps the uſual way of introducing Engliſh ſtatutes into Ireland, was to tranſmit them thither under the great ſeal, as they were ſent into Engliſh counties to the ſheriffs. Thus when the ordinance of which we are now ſpeaking directs that felonies ſhall not be pardoned generally, but the fact be ſpecified, it goes on, *juxta tenorem cujuſdam ſtatuti per nos et conſilium noſtrum Angliæ editi, et miſſi ad Hiberniam obſervandi* (*g*), alluding to a ſtatute of this king, which will hereafter be mentioned (*h*). The whole buſineſs of legiſlation was, in theſe days, extremely arbitrary and irregular, as well in the manner of executing and enforcing ſtatutes, as in the making of them.

(*a*) Ch. 3. 5. 10. 18. (*b*) Ch. 4. (*c*) Ch. 6. (*d*) Ch. 9. (*e*) Ch. 11. (*f*) Ch. 17. (*g*) Ch. 6. (*h*) Vid. poſt.

To

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To return to Engliſh affairs. As Edward had aſſumed the title of France, ſome perſons apprehended, that, ſhould the two crowns hereafter unite upon one head, this, as the ſmaller, might be treated as the ſubject kingdom. To quiet theſe jealouſies, the king cauſed it to be declared in parliament, by ſtat. 14 Ed. III. ſt. 5. that this kingdom ſhould never be in ſubjection to him or his heirs, *as* kings of France: but this is one of thoſe laws to which it has pleaſed Providence there ſhould be no occaſion to reſort.

Lancaſter made a county palatine.

SOME years after, the king dealt leſs ſcrupulouſly with the crown and its prerogatives, by inveſting one of his ſubjects with a part of its royalties. William the Conqueror, ſoon after he was ſettled, had given to the earl of Cheſter the royalty and prerogatives of a county palatine in Cheſter; and the ſame princely franchiſe had for many years been enjoyed by the biſhops of Durham, in their biſhopric. In imitation of theſe, the king, in the 25th year of his reign, having promoted Henry earl of Lancaſter to the title of duke, in reward of his great ſervices in the French war, erected the county of Lancaſter into a county palatine, and conferred the prerogatives and royalties of it upon the duke. Thus the duke of Lancaſter became a ſort of prince within his county, with all civil and judicial authority touching the property and lives of the inhabitants thereof, with courts, writs, and officers neceſſary for the adminiſtration of juſtice; all which was to be tranſacted by his ſeal and ſanction. So diſtinguiſhed an honour as this was conferred in open parliament (*a*).

THE lords marchers on the confines of the principality of Wales exerciſed franchiſes ſomewhat ſimilar to thoſe of counts palatine. To keep theſe under the ſovereignty of the king, it was enacted, by ſtat. 28 Ed. III. c. 2. that theſe lordſhips ſhould be attending and annexed to the crown of England, as they and their anceſtors had been in all times paſt, and not to the principality of Wales, into whoſeſoever hands the principality might come. The dependence of theſe lords on the crown of England was extremely neceſſary towards the peace and quiet of the neighbouring counties.

IN no time was there greater ſhew of ſolicitude to ſecure the ſubject in the enjoyment of his rights and privileges, than all thro' this reign. It was in this ſpirit that the ſtat. 4 Ed. III. c. 14. was made, ordaining, that a parliament ſhould be held every year once, and more often if need be; which was renewed by ſtat. 36 Ed. III. ſt. 1. c. 10. It was intended by the frequent and regular meeting of that aſſembly, that reſort might always be had

The Charters.

(*a*) Tyrr. Vol. III. 567.

there

there for the correction of diſorders, and the amendment of the law. The Great Charter, and the Charter of the Foreſt, being conſidered as the corner-ſtone of Engliſh liberty, were confirmed over and over again. It ſeemed to be a matter of courſe all thro' this reign to prefix a confirmation of the Charters to every ſtatute of any length or conſequence. To theſe two Charters were ſometimes added, a confirmation of all franchiſes and privileges enjoyed by cities, boroughs, or individuals; and ſometimes, tho' leſs frequently than in former times, a confirmation of the liberties of the church (*a*). Not contented with theſe general confirmations, particular parts of *Magna Charta*, which were eſteemed more calculated for protecting the rights of the people, were ſpecially re-enacted. It was declared, by ſtat. 5 Ed. III. c. 9. (in conformity with the expreſs words almoſt of *Magna Charta*, ch. 29.) that no man ſhould from thenceforth be attached on any accuſation, nor forejudged of life or limb; nor his lands, tenements, goods, nor chattels, ſeized into the king's hands againſt the form of the Great Charter and the law of the land. And again, by ſtat. 28 Ed. III. c. 3. that no man, of what eſtate or condition ſoever, ſhould be put out of his land or tenement, nor taken, nor impriſoned, nor diſinherited, nor put to death, without being brought in to anſwer by due proceſs of law.

Of purveyance.

AMONG other grievances provided againſt by the Great Charter, and alſo by ſtatutes in this reign, was that of *purveyance*. Very early in this king's time ſome laws were made to regulate purveyors; and theſe were followed by ſeveral others made in different parts of the reign. It was enacted, that there ſhould be no purveyance but for the houſe of the king, queen, and their children; which, too, was to be at a fair appraiſement (*b*): and it was made felony to take any thing, by way of purveyance, without a lawful warrant (*c*). Many other checks were impoſed on purveyance. The commiſſion of purveyors was to be under the great or privy-ſeal, and none other (*d*): they were not to take timber (*e*); and the king's butler was not to take more wine than ſhould be appointed (*f*). Purveyances under twenty ſhillings were to be paid immediately, and thoſe above that ſum within a quarter of a year (*g*): afterwards it was directed, that poultry and other ſmall things ſhould be paid for with ready money; and other things within a month or ſix weeks (*h*). At length it was enacted, that the *heinous name*

(*a*) Stat. 1 Ed. III. ſt. 2. c. 1. 9. Stat. 2 Ed. III. c. 1. Stat. 5 Ed. III. c. 1. Stat. 14. Ed. III. ſt. 1. c. 1. Stat. 31 Ed. III. ſt. 1. c. 1. Stat. 37 Ed. III. c. 1. Stat. 38 Ed. III. ſt. 1. c. 1. Stat. 42 Ed. III. c. 1. Stat. 50 Ed. III. c. 1. 2. (*b*) Stat. 4 Ed. III c. 3. Stat. 34. Ed. III. c. 2. (*c*) Ch. 4. Stat. 5 Ed. III. c. 2. Stat. 14 Ed. III. ſt. 1. c. 19. (*d*) Stat. 25 Ed. III. ſt. 5. c. 1. (*e*) Ch. 6. (*f*) Ch. 21. (*g*) Stat. 28 Ed. III. c. 12. (*h*) Stat. 34 Ed. III. c. 3.

of

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of *purveyor* ſhould be changed, and he ſhould be named *buyer*; and accordingly that ſtatute all thro' ſpeaks of it as of *buying and ſelling*, and *buyers and ſellers*. This ſtatute confines ſuch prerogative-*buying* to the houſe of the king and queen only; nor was it to be made but where there was plenty. The commiſſioners were to be people of ſufficient eſtate; their commiſſions to be renewed half-yearly. All takings and buyings were to be paid for with ready-money; and to take any otherwiſe than ordained by this act, was made felony *(a)*, as we have ſeen it had been upon the former method of purveyance. There were likewiſe penalties inflicted on buyers, if they favoured ſome, and charged others *(b)*. Commiſſions were to be awarded to enquire what things buyers had taken, and what they had delivered; and puniſhments inflicted for defaults either in taking or delivering (*c*). Thus was the great oppreſſion of purveyance gradually fined down to a more gentle form, till it amounted to little more than a pre-emption, or preference in favour of the king and queen's houſhold.

Tenures.

We come now to the ſtatutes relating to property; and firſt to thoſe that made any alteration in the law of tenure. We have ſeen how the law ſtood as to the alienation of the king's tenants, or tenants *in capite*, by the ſtatute *De prerogativâ regis* (*d*). It ſeems, that tenants *in capite* could not alien without the king's licence; and if they did, the land uſed to be ſeized into the king's hand as forfeit, according to the rigour of the old law between lord and vaſſal. This was, however, now thought a ſevere penalty; and it was ordained by ſtat. 1 Ed. III. ſt. 2. c. 12. that the king ſhould not in ſuch caſe hold the land as forfeit, but that in all caſes of ſuch alienation, he ſhould have a reaſonable fine in the chancery to be levied by due proceſs. Thus forfeiture for alienation was wholly taken away, and in lieu thereof a fine was of courſe paid by the king's tenants, either before or after alienation. Some years after, in order to quiet property, a ſtatute was made *(e)* to confirm all alienations of tenants *in capite*, made in the reign of Henry III. or before; ſaving to the king his prerogative, as to all that had been made in the time of Edward I. II. and in the preſent reign. And becauſe ſome lands holden of the king, as of an honour, had been ſeized for alienation, under pretence of their being tenancies *in capite*, contrary to *Magna Charta*, which had explained this matter *(f)*, it was declared by the ſame ſtatute *(g)*, that no man ſhould be aggrieved by reaſon of ſuch purchaſes.

(*a*) Stat. 36 Ed. III. ſt. 1. c. 2. (*b*) Ch. 3. (*c*) Ch. 4, 5, 6. (*d*) Ch. 6. Vid. ant. (*e*) Stat. 34 Ed. III. c. 15. (*f*) Ch. 31. Part I. 183. (*g*) Stat 1 Ed. III. ſt. 2. c. 12.

To

To qualify ſome of the king's feudal claims, it was declared, by ſtat. 25 Ed. III. ſt. 5. c. 11. that a reaſonable aid *pur faire fil chevalier*, and *pur file marier*, ſhould be levied according to the ſtatute, and in no other way; that is, of every knight's fee held immediately of the king twenty ſhillings, and of every twenty pounds of land holden immediately of the king in ſoccage, twenty ſhillings and no more. The ſervices of tenure were made a pretence for exacting more attendance than tenants were by law bound to perform. Such exceſſes made it neceſſary to declare, by ſtat. 25 Ed. III. ſt. 5. c. 8. that no man ſhould be conſtrained to find men of arms, hoblers, nor archers, except they held by thoſe ſervices, and then by common aſſent and grant of parliament; ſo that even the common dues of tenure were no longer to be demanded, than when they were called forth by an act of parliament. Theſe ſtrongly ſhew, that the feudal conſtitution had now ceaſed to anſwer the purpoſes of its firſt inſtitution, and was haſtening to the decay and neglect into which it ſoon after fell. In the time of Edward II. the miniſters of that prince had compelled many to enter into obligations to be attendant on the king with arms and accoutrements; all which were declared void in the firſt year of this reign (*a*), and ordered to be cancelled. To ſuch expedients had they recourſe, as ſubſtitutes for the ancient military policy, which was now found inadequate and uſeleſs.

TENURES were principally conſidered as a ſource of revenue to the crown: in that light they were as ſtrictly kept up as ever, and became very often the occaſion of great oppreſſion. The aſcertaining of the king's right, in theſe inſtances, depended on the eſcheators; and many ſtatutes were made in this reign for the better ordering of this office, as well to ſecure the king in a due receipt of all his lawful caſualties, as to protect the people againſt the mal-practice of officers intruſted with ſo much power. It ſeems, the number of eſcheators had been reduced to two; one to act on this ſide *Trent*, the other beyond it. But a ſtatute was made to increaſe the number to what they had been when the king firſt came to the throne; which number is not mentioned by the act. It was further ordained, that thoſe eſcheators ſhould be choſen by the chancellor, treaſurer, and chief baron of the exchequer, taking to them the chief juſtices of the two benches, if they were preſent, the ſame as in chuſing ſheriffs (which will be mentioned hereafter); and no eſcheator was to continue in his office above a year (*b*). Eſcheators were not to do waſte in lands belonging to the king's heirs, but were to return the

(*a*) Stat. 1 Ed. III. ſt. 2. c. 15. (*b*) Stat. 14 Ed. III. ſt. 1. c. 8.

writ of *diem clauſit extremum*, with a true extent into the chancery forthwith; and if the next friends of the heir pleaſed, they might have the lands in farm till the heir's age, yielding the value to the king, by agreement with the chancellor and treaſurer. The heirs, when they came of age, were to have an action of waſte againſt ſuch guardians and farmers (*a*). Eſcheators were to be anſwerable to the king for the value of the farms of mills and other profits belonging to the king's heirs, in proportion to the time they were in the king's hands (*b*): they were to take inqueſts by good people and lawful, of ſufficient inheritance and good fame, and of the ſame county where the enquiry ſhould be; and the inqueſts ſo taken were to be indented between the eſcheators and the jurors; if not, they were to be void: the inqueſts were alſo to be taken in good towns, openly, and not privately (*c*). Wherever lands were ſeized into the king's hands by office of the eſcheator, on account of alienation without licence, or the tenant *in capite* died leaving his heir within age, which was returned into the chancery; then, if the tenant would *traverſe the office* ſo taken by the king's command, and ſay, that the lands were not ſeizable, he was to be received ſo to do, and proceſs was to be ſent into the king's bench to try it according to law (*d*).

At length it was ordained more fully by ſtat. 36 Ed. III. ſt. 1. c. 13. that land ſeized into the king's hands becauſe of ward ſhould be kept without waſte; that the eſcheator ſhould have no fee of wood, fiſh, veniſon, or other thing; but ſhould anſwer yearly to the king for the iſſues and profits; and if he did otherwiſe, and was attainted thereof, he was to be ranſomed at the king's will, and yield to the heir treble damages: the ſame was to be in all caſes of lands ſeized into the king's hands by office taken before eſcheators. The eſcheator was to ſend the inqueſt, within a month, into the chancery, and a writ was to be delivered to him to certify the cauſe of ſeiſin; and then any party might be heard to traverſe the office, and ſhew his right, as directed by the above act; only there is added by the preſent ſtatute, the pain of two years impriſonment in caſe the eſcheator acted otherwiſe. By ſtat. 42 Ed. III. c. 5. no perſon was to be eſcheator unleſs he had 20l. at leaſt of lands in fee, and diſcharged his office in perſon. There was great complaint, that eſcheators, ſheriffs, and other officers of the king, ſeized the lands, goods and chattels of many, ſurmiſing that they were outlawed; which was often grounded upon the ſameneſs of name with the perſon inſerted in the writ, who was not ſufficiently diſtinguiſhed by an addi-

(*a*) Ch. 13. (*b*) Stat. 28 Ed. III. c. 4. (*c*) Stat. 34 Ed. III. c. 13. (*d*) Stat. 34 Ed. III. c. 14.

tion,

tion, or particular deſcription. To prevent the oppreſſion conſequent upon ſuch miſtakes, it was ordained, by ſtat. 37 Ed. III. c. 2. that perſons ſo injured ſhould have a writ of *idemptitate nominis*, as had been the uſage before. But, beſides that, the following courſe of redreſs was now directed: The party whoſe land or goods were ſeized was to find ſurety before the officer who had the warrant of ſeizure, to anſwer for the value to the king; and this was to be done without any fee, on pain of double damages to the party grieved, and being heavily puniſhed at the king's ſuit. Thus, in one inſtance, was a very ſummary method deviſed for thoſe who were injured by theſe officers.

Of the clergy.

SEVERAL ſtatutes were made in this reign to ſettle ſuch claims of the clergy as ſtill remained expoſed to the jealouſy of the temporal power, and were not ſecured by any parliamentary proviſion. The great ſubject of diſcuſſion between the ſpiritual and temporal authority had hitherto been upon the juriſdiction of cauſes, and the perſonal exemption of clerks from the ſecular courts. This diſpute had been ſo adjuſted by the ſtatute of *Circumſpectè agatis*, and the *Articuli cleri*, in the laſt reign, that no further clamour could be kept up on that head. However, ſome points reſpecting the property of the church called for regulation; and others that had been lately occaſioned thro' the ambition and avarice of the pope, created new apprehenſions, and became a freſh ſubject of diſcontent in this and the next reign. It was endeavoured to reſtrain theſe new uſurpations by the ſtatutes of *proviſors*: theſe, and the other ſtatutes relating to the clergy, ſhall be mentioned in the order in which they were made.

THE firſt ſtatute on the ſubject of eccleſiaſtics and eccleſiaſtical property, is ſtat. 1 Ed. III. ſt. 1. c. 10. by which the king binds himſelf not to demand of biſhops and religious houſes, any penſions, prebends, churches, and corodies for perſons, but in caſes where he in conſcience might do it. The next are, ſtat. 4 Ed. III. c. 6. and ſtat. 5 Ed. III. c. 3. both confirming the ſtatute of Carliſle, 34 Ed. I. ſt. 1. (*a*): then follows ſtat. 14 Ed. III. ſt. 4. which was occaſioned, as the act ſays, by many oppreſſions and grievances done in divers manners by the king's ſervants to people of holy church. To prevent theſe in future, it was enacted, in the firſt place, that the king's purveyors ſhould take nothing within the fees of holy church againſt the will of the owners (*b*). The other proviſions of this act related to the temporalties of biſhops. As the law now ſtood, the exception of plenarty, in a writ for

(*a*) Part I. 453. (*b*) Ch. 1.

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recovery of a preſentation, was never allowed againſt the king, becauſe of the old maxim, *nullum tempus occurrit regi (a)*. It often followed from this, that perſons were turned out of their benefices after long poſſeſſion, by reaſon of the temporalties of biſhops and advowſons of infants coming into the king's hands. To remedy this in future, it was ordained, that the king, in ſuch caſes, ſhould not make collation or preſentment after three years from the avoidance; nor ſhould any one, after ſuch time, be bound to anſwer to the king in a *quare impedit* (*b*). And further, the king declared that he would not ſeize into his hands the temporalties of biſhops, abbots, priors, or other people of holy church, without juſt cauſe, according to and by judgment of law *(c)*.

BECAUSE the king's eſcheators and other keepers of temporalties had been uſed to commit great waſte, it was ordained, that ſuch perſons ſhould do no waſte or deſtruction; they ſhould fell no underwood, not hunt or fiſh thereon, nor rack the tenants: and in order to put the cuſtody of temporalties into ſafer hands than thoſe of the king's officers, they were to be offered to the dean and chapter, to whom they were to be demiſed by the chancellor and treaſurer at a reaſonable rate, according to the remembrances in the exchequer; ſo that eſcheators ſhould have no right to intermeddle therein; ſaving, however, to the king all knights fees, advowſons of churches, eſcheats, wards, marriages, reliefs, and ſervices of the ſaid fees (*d*). The letting ſuch lands to the dean and chapter was founded upon the ſame policy as that before mentioned, of letting the lands *(e)* to the next friends of the heir; theſe perſons having a ſort of intereſt in the lands, at leaſt ſuch a relation to them as would reſtrain them from committing deſtruction or waſte thereon.

ANOTHER ſtatute was made for the better ordering of clerical property, intitled, *A ſtatute for the clergy*, ſtat. 18 Ed. III. ſt. 3. One proviſion of this was to ſecure the execution of the ſtatutes of mortmain paſſed in the time of Edward I. If prelates, ſays the act, clerks beneficed, or religious people, who have purchaſed lands in mortmain, were impeached thereof before juſtices, and they ſhewed the king's charter of licence and proceſs thereupon made by an inqueſt of *ad quod damnum*, or of the king's grace, or by fine, they ſhould be left in peace, without any further diſturbance: and if it ſhould not appear that they entered by licence, they ſhould be received to make a convenient fine for the ſame, and ſo the matter ſhould ceaſe (*f*).

(*a*) Vid. ant. (*b*) Ch. 2. (*c*) Ch. 3. (*d*) Ch. 4, 5. (*e*) Vid. ant. 58. (*f*) Ch. 3.

IN

In matters of juriſdiction, beſides the grant that an archbiſhop ſhould not be impeached criminally before the king's juſtices, and what related to the trial of baſtardy (*a*) (both which will be mentioned in another place), it was declared, that no prohibition ſhould be awarded out of the chancery but where the king had cognizance (*b*). And becauſe commiſſions had of late been given to juſtices to enquire into the conduct of eccleſiaſtical judges, whether they made juſt or exceſſive proceſs in cauſes teſtamentary, and others that notoriouſly belonged to the church, upon which commiſſions many ſpiritual judges had been indicted; it was now enacted, that ſuch commiſſions ſhould be repealed, and no others ſhould be granted, except only ſuch articles as uſed to be in the eyre.

It was a common proceſs to inſtitute an enquiry about tythes by a *ſcire facias* againſt ſome eccleſiaſtical perſon, warning him to anſwer in the chancery concerning his tythes, and there ſhew cauſe wherefore the tythes in queſtion ſhould not be reſtored to the demandant; which *ſcire facias* was as well for the king as the party. It was enacted, that ſuch writs ſhould no longer be brought (*c*).

In the 25th year of the king there was another ſtatute for the clergy, better known by the title of *Statutum de clero*, 25 Ed. III. ſt. 3. By the firſt chapter of this act, the king gave up all right to any preſentations that belonged to his anceſtors in right of any one elſe; but having made this renunciation of right to enforce old claims, it was, in return, thought proper that the limitation which had been ſet by ſtat. 14 Ed. III. ſt. 4. c. 2. to his preſentations (*d*), ſhould be repealed; and ſo it was by ch. 2. of this act. And becauſe the king ſometimes made preſentations upon untrue ſuggeſtions of clerks, where he had no right, it was ordained, that if at any time before judgment it ſhould appear upon examination that he had no right, the preſentation ſhould be inſtantly repealed, and the other party have all proper writs out of chancery to reinſtate him in his rights (*e*). Again, after a lapſe to the biſhop, a judgment would ſometimes be obtained by the king, thro' the colluſion of the patron, in order to defraud the biſhop of his right of preſentation by lapſe; and it was not the uſage to admit the biſhop or his clerk to defend the right, and counterplead the king's title. To remedy this, it was enacted, that where biſhops ſo preſented, and then the king preſented and brought his action againſt the patron, who ſuffered the king to

(*a*) Ch. 1, 2. (*b*) Ch. 5. (*c*) Ch. 7. (*d*) Vid. ant. 59. (*e*) Ch. 3.

recover

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recover without trying the right; in ſuch caſe, the biſhop ſhould be received to counterplead the king's title, altho' he claimed nothing in the patronage (*a*). And becauſe the eccleſiaſtical cognizance of avoidance of livings had been lately encroached upon by the ſecular juſtices, it was declared, that the ſaid juſtices ſhould receive challenges in favour of the clerical juriſdiction, when made by any biſhop (*b*).

THAT biſhops might not be brought into the danger of having their temporalties ſeized into the king's hands ſo often as they had been for contempts, in not obeying writs of *quare non admiſit*, it was ordained, that the juſtices might receive a reaſonable fine, according to the degree of the contempt, in lieu of ſuch forfeiture (*c*). This ſtatute, and that which took away *nonplevin*, changed, very conſiderably, the old proceſs of contempt. The remaining proviſions of the ſtatute *de clero*, concerning privilege of clergy and indictments, belong to another part of this work.

Of proviſors.

WE have ſeen the jealouſy entertained in the reign of Edward I. of foreign eccleſiaſtics, who were trying all means of draining church-property out of the kingdom: this was checked in ſome degree by the ſtatute *de aſportatis religioſorum*, made at *Carliſle* (*d*). At the time of that act, another method than that aimed at by the act, of conveying the riches of the church into the hands of foreigners, had grown into practice. The perſons acting in this new device were called *proviſors*; but tho' the parliament were then appriſed of it, no ſpecial regulation was made to reſtrain it, and it was left merely with the judgment of the legiſlature againſt it (*e*). However, to ſuch a height had this grown, and ſo exaſperated were the nation at ſuch an encroachment, that in the firſt year of this king's reign there was a petition from the commons, praying, that no alien *proviſor*, nor any procurator for him, ſhould come into the land, or go out of the realm or the king's power, in order to proſecute any *proviſion*, under pain of life and member, that is, of felony; but the conſideration of this matter was adjourned till the king ſhould come of age (*f*): and we find nothing done on this ſubject by the legiſlature till the 25th year of the king, when complaint was again made of thoſe "who purchaſe in the court of Rome *proviſions* to have abbies and "priories in England, in deſtruction of the realm and of holy religion." And to remedy this it was then enacted, by a chapter at the latter end of the ſtatute of purveyors, ſtat. 25 Ed. III. ſt. 5. c. 22. that whoever purchaſed ſuch

(*a*) Ch. 7. (*b*) Ch. 8. (*c*) Ch. 6. (*d*) Part I. 405. (*e*) Rot. Parl. (*f*) Parl. Rot. 1 Ed. III. 26.

proviſions

proviſions of abbies or priories, both himſelf, his executors, and procurators, who ſued and put in execution ſuch proviſions ſhould be out of the king's protection, and be treated as the king's enemies; and all perſons who did any wrong to the perſons or property of ſuch proviſors, were to be liable to no action for the ſame.

In this manner did the parliament begin with theſe eccleſiaſtical offenders: but it did not ſtop here; for, in the ſame year, a ſpecial act was made, intitled, *A ſtatute of proviſors of benefices*, 25 Ed. III. ſt. 6.: and again, in the very next parliament there was another ſtatute of *proviſors*, 27 Ed. III. ſt. 1. Theſe two are the ſtatutes of proviſors moſtly referred to on this ſubject, and contain in them the whole method of proceeding againſt ſuch offenders and others of the like ſort.

The firſt of theſe ſtatutes is opened with a long preamble ſetting forth the grounds upon which ſuch reſtrictions were to be juſtified, and the preſent neceſſity there was for making them. This preamble, together with the enacting part of the ſtatute, gives a perfect idea what *proviſion* and *proviſors* were; for which reaſon we ſhall ſtate the ſubſtance of this preamble, preferring it to any other account of theſe two words that might be extracted from writers of a later date, tho' of great learning and accuracy; this being the method that has been adhered to thro' the whole of this Hiſtory, to purſue the language of our ſtatutes and law-books as the beſt guides in matters wholly of a legal nature, without recurring to the aid of modern writers, except on ſome very few occaſions.

The preamble recites, that it had been ſhewn to the parliament of Carliſle, 35 Ed. I. that the church of England was founded by the kings and nobles of the realm, for their inſtruction and that of the people; and alſo for keeping up hoſpitality and alms and other works of charity in places where the churches were founded; for which purpoſes, fees and rents to a great amount had been appropriated by the ſaid founders to the prelates and other beneficed perſons; from which reſulted that right of collation and preſentation claimed by the king and his nobles; and that the higher orders of ſuch clergy conſtituted a conſiderable part of the king's great council, to adviſe him in national affairs. This being the nature and condition of the national church-eſtabliſhment, it was conſidered as a great grievance that the biſhop of Rome, *accroaching* to himſelf the ſeignories of ſuch poſſeſſions and benefices, did grant the ſame benefices to aliens who never dwelt in England, and to cardinals who by the rule of their order could not live here, and to

others,

others, as well aliens as denizens, as if he was patron, and had the advowſon of ſuch dignities and benefices, contrary to the known law of the kingdom; ſo that, in a ſhort time, if the biſhop of Rome went on in that manner, there would ſcarcely be a benefice in the realm but would be in the hands either of aliens or denizens by virtue of ſuch *proviſions*, without the concurrence, and againſt the will, of the founders and patrons of the advowſons, to the entire deſtruction of all the purpoſes for which ſuch eccleſiaſtical eſtabliſhments were made. It was therefore at that time adjudged, in full parliament, that ſuch oppreſſions ſhould not be ſuffered. The preamble of the ſtatute goes on and recites, that in the preſent parliament, 25 Ed. III. a further complaint was made on this ſubject, namely, that the aforeſaid miſchiefs daily increaſed more than ever; and that now of late the biſhop of Rome, by procurement of clerks and otherwiſe, had *reſerved*, and did daily reſerve, to his collation, generally and ſpecially, as well archbiſhoprics, biſhoprics, abbies, and priories, as all other dignities and other benefices of England, which were of the advowſon of people of holy church, and give the ſame as well to aliens as to denizens, and took of all ſuch benefices the *firſt-fruits*, and many other profits, ſo that great part of the wealth of the country was expended in the purchaſe of ſuch livings; and many clerks who had been preſented by their lawful patrons, and had holden their benefices for a long time peaceably, were put out. To remedy all theſe miſchiefs, and in purſuance of the opinion of the parliament in the 35th year of Edward I. it was now enacted as follows:

In the firſt place, it was enacted, that all elections to church preferments that were elective, ſhould be free as in times paſt; and that all perſons collated or preſented ſhould enjoy the ſame freely, in the manner in which they were *infeoffed* by their donors: and ſecondly, in caſe any *reſervation*, collation, or proviſion, was made by the ſee of Rome of any church-benefice, in diſturbance of ſuch free election, collation, or preſentation, then, for that time, the king ſhould have the collation to ſuch archbiſhoprics and other dignities as were elective, and of his advowſon, in the ſame manner as his progenitors enjoyed it before free elections were granted, under certain forms and conditions; ſuch as to demand of the king a *congé d'elire*, and after the election to have the king's aſſent, which ought to be the form obſerved now; and if it was deviated from, and the conditions not kept, it was but reaſonable, ſays the ſtatute, that the thing ſhould return to its firſt nature. In like manner, if it was of any houſe of religion of the king's advowſon, the king ſhould have the collation for that time; and ſo alſo of any church, prebend,

prebend, or benefices, of the advowſon of any perſon of holy church. But if ſuch houſes of religion or church-benefices belonged to the advowſon of any lord, or other perſon, then the collation, in the above caſes, was to fall to him; and if ſuch patrons did not preſent within half-a-year after the avoidance, nor the biſhop by lapſe within a month after ſuch half-year, then the preſentation to belong to the king.

It was enacted, if the perſons preſented by the king or any of the before-mentioned patrons were diſturbed by ſuch *proviſors*, that ſuch proviſors, their procurators, executors, and notaries, ſhould be attached by their bodies and brought in to anſwer; and if convicted, ſhould abide in priſon without bail or mainprize, till they had made fine and ranſom to the king, at his will, and gree to the party grieved; and before they were releaſed, make renunciation, and find ſufficient ſurety not to do the like in time to come, nor to ſue any proceſs by themſelves or by any other, at the court of Rome or elſewhere, on account of ſuch impriſonment or renunciation, or other matter relating thereto: and in caſe ſuch proviſors, procurators, executors, or notaries, were not found, the *exigent* was to run againſt them by due proceſs, and writs iſſued to take their bodies, as well at the king's ſuit as at that of the party. In the mean time, the king was to have the profits of ſuch benefices ſo occupied by proviſors, except abbies, priories, and other houſes, that had colleges or convents; and in ſuch houſes the colleges or convents were to have the profits. In order to ſuppreſs theſe practices as ſoon as poſſible, this ſtatute was to relate as well to ſuch collations in times paſt, as in times to come.

We have ſeen, that theſe proviſors were to find ſecurity not to ſue proceſs in the court of Rome, to invalidate any of the regulations of the laſt act againſt proviſion. The ſuing in the court of Rome was another miſchief that was heavily felt at this time, and loudly complained of, as an infringement upon the law of the country, and the independence of the nation. To reſtrain theſe applications to a foreign tribunal, the following regulations were made by the ſtat. 27 Edw. III. ſt. 1. c. 1. which alſo is called in the ſtatute-book, *A Statute of Proviſors.* It was ordained, that all people of the king's ligeance, who ſhould draw any one out of the realm in plea, the cognizance whereof belonged to the king's court, or concerning things whereof judgment had been given in the king's court; or who ſued in other court, to defeat or impeach the judgments given in the king's court; ſhould have a day, containing the ſpace of two months, by warning to be made to them, in the place where the poſſeſſions in queſtion lay, or where they had lands, or other poſſeſſions, by the ſheriffs, or other the king's miniſters,

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niſters, to appear before the king and his council, or in his chancery, or before the king's juſtices in the one or other bench, or before other juſtices deputed for that purpoſe, to anſwer in perſon to the king for the contempt: and if they came not at the day, then they, their procurators, attornies, executors, notaries, and maintainers, ſhould from that day be put out of the king's protection, their lands, goods and chattels forfeited to the king, and their bodies taken and impriſoned, and ranſomed at the king's will: and thereupon a writ was to be made to take their bodies, and to ſeize their lands, goods and poſſeſſions into the king's hands; and if this writ was returned *non inventus*, they were to be put in exigent and outlawed: the appearance of the offender any time before the outlawry was to intitle him to be received, to abide the judgment of the court, but ſuch appearance was not to ſave the forfeiture.

THE ſubject of *proviſions*, and *citations* out of the court of Rome was taken up again, ſome few years after, and a new courſe was chalked out for reſtraining practices ſo inimical to the laws and conſtitution of the country: this was by ſtat. 38 Ed. III. ſt. 2. In the firſt place, the ſtatutes 25 & 27 Ed. III. were confirmed, except only that prelates and lords were not to be ſubject to the arreſt or impriſonment which had been ordained by thoſe acts: and then, in addition to thoſe two acts, it was ordained, that thoſe who had purchaſed or obtained, at the court of Rome, citations againſt the king, or any of his ſubjects, or had procured deaneries, archdeaconries, provoſties, and other dignities, offices, chapels, or benefices of holy church, pertaining to the collation, or gift of the king, or other lay patron of the realm; and alſo perſons who obtained churches, chapels, offices, benefices, penſions, or rents, amortiſed, and appropriated to churches cathedral or collegiate, abbies, priories, chauntries, hoſpitals or other poor houſes; and alſo all maintainers and abettors of ſuch perſons, and thoſe ſuſpected of ſuch purſuits, ſhould be arreſted and taken by the ſheriff of the place, and juſtices in their ſeſſions, deputies, bailiffs, and other the king's miniſters, by good and ſufficient mainpriſe, replevin, bail, or other ſurety (the ſhorteſt that might be), and be preſented to the king, or his council, there to remain and ſtand to right, to receive what the law would give them; and if they were attainted of any of the above matters, they were to ſuffer the penalties ordained by ſtat. 25 Ed. III. before-mentioned (*a*).

(*a*) Ch. 1.

IT

If a perſon ſuſpected of any of the above offences was not within the realm, or could not be attached, he was to be proceeded againſt according to ſtat. 27 Ed. III. (*a*). If any perſon attempted any thing againſt this ſtatute, he was to be brought to anſwer in the above manner, and if found guilty was to be out of the king's protection, and puniſhed according to the ſtat. 27 Ed. III. On the other hand, all perſons ſuing maliciouſly upon this ſtatute were to be puniſhed at the ordinance of the king or his council. All the lords and commons bound themſelves to ſee this act fully executed. Upon the ſtat. 27 Ed. III. was formed a writ to *garniſh* or *warn* ſuch offenders to appear; which writ was in after-times, from the initial word of it, called a *præmuneri*, or rather *præmunire, facias*; a piece of law Latin for *præmoneri facias*, &c.

The ſtat. 38 Ed. III. ſt. 1. c. 4. may be reckoned among the laws for reſtraining the clergy from drawing money out of the kingdom to the court of Rome. It ſays, that whereas many people were bound in *another court* out of the realm (namely, that of Rome), by inſtruments, and in other manner, *ſuch* penal bonds in the third perſon (which form was peculiar to them) ſhould be void.

Probate of wills and inteſtacy.

To return to the 31ſt year of the king. The parliament had been frequently ſolicited to make ſome regulation about the probate of wills; a matter which had been managed by biſhops' officers at their pleaſure, without much regard to the duties of their office, or the accommodation of the public (*b*); but nothing could be obtained, further than recommendations to the biſhops to amend and correct abuſes. In the 31ſt year, it was complained that the miniſters of biſhops and other ordinaries took grievous and outrageous fines for the probate of teſtaments, and for making acquittances thereof. Upon this a ſtatute was made, ſtat. 31 Ed. III. ſt. 1. c. 4. ordaining, that as the king had charged the archbiſhop of Canterbury and other biſhops to have this amended, if they neglected ſo to do, the king ſhould cauſe his juſtices to enquire of ſuch oppreſſions and extortions, and determine upon them, as well at his own ſuit as that of the party.

If a man died inteſtate, we have ſeen that the goods went to the ordinary, who diſpoſed of them as he pleaſed for the good of the deceaſed perſon's ſoul; but it was preſumed the ordinary would anſwer all debts and demands upon ſuch effects, to which he was alſo bound by the ſtatute of Weſtm. 2d (*c*). However, as the law now ſtood, the relations, as it ſhould

(*a*) Ch. 2. (*b*) Parl. Roll. 21 Ed. III. 51. (*c*) Part I. 411.

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ſeem, were entitled to nothing, at leaſt in the *dead man*'s part, whatever claim they might be thought to have in the other two-thirds. But this was put upon another footing by ſtat. 31 Ed. III. ſt. . c. 11. which ordains and declares, that where a perſon dies inteſtate, the ordinary ſhould depute *the next and moſt lawful friends (a)* of the inteſtate to adminiſter his goods. In order to give the full effect to this truſt, the ſtatute ordains, that ſuch deputies ſhould have an action to demand and recover as executors the debts due to the inteſtate, in the king's court, to adminiſter and diſpend them for the ſoul of the dead, the pretence under which they had in former times been claimed by the ordinary (*b*); and ſhould anſwer alſo in the king's court, to others to whom the ſaid dead perſon was *holden and bound* (that is in obligations), in the ſame manner as executors ſhould; and further, they were, like executors, to be accountable to the ordinaries: from which it ſeems, that the next friends of the deceaſed were to act merely as deputies to the ordinary, who was finally, as before, to have a ſort of reſulting truſt in the overplus, beſides the election and patronage of delegating the adminiſtration to whom he pleaſed of the next friends.

The next parliamentary regulation relating to the clergy, was ſtat. 36 Ed. III. ſt. 1. c. 8. which was occaſioned by the plague, that had thinned the church, as well as the laity. The prieſts having from thence taken occaſion to make high demands for their ſervice, certain limits were fixed by ſtatute on the attendance of pariſh and other prieſts. The next was in matter of tythes. The clergy had claimed tythe of wood of the age of twenty years or more, when felled for ſhip-building or other uſes, under the name of *ſylva cædua*. Complaint of this had been often made to the parliament (*c*). It was now declared, by ſtat. 45 Ed. III. c. 3. that a prohibition and attachment ſhould lie in ſuch caſe. Reſpecting prohibitions in general, it was ordained by ſtat. 50 Ed. III. c. 4. that where a *conſultation* was once duly granted upon a prohibition made to a judge of holy church, the judge might proceed in the cauſe by virtue of that conſultation, notwithſtanding any other prohibition, provided the matter of the libel of the ſaid cauſe was not engroſſed, enlarged, or otherwiſe changed.

In the ſame parliament a new ſanction was given to the privilege of perſon claimed by clerks. It was complained, that divers prieſts, *bearing the ſweet ody of our Lord Jeſus Chriſt to ſick people*, with their clerks, and other people of holy church, while they attended divine ſervice in churches

(*a*) *De plus procheins, et plus loialx amis.* (*b*) Part I. (*c*) Cott. Abrig. 21 Ed. III. 48.

and

and church-yards, and other places dedicated to God, were often arreſted; which was an offence to God, ſays the ſtatute, and a diſturbance of divine ſervice: it was therefore enacted, by ch. 5. of this ſtatute, that the ſame ſhould not be done in future. This is the laſt proviſion concerning the clergy in this reign.

The ſtatutes of labourers.

The firſt ſtatute of labourers was made ſoon after the great plague, which having thinned the lower claſs of people, ſervants and labourers took thence occaſion to demand very extravagant wages; and rather than ſubmit to work upon reaſonable terms, they became vagabonds and idle beggars. It was found neceſſary to take ſome compulſory method, in order to reduce this rank of people to ſome regularity; and therefore an ordinance was made by the king and council, to whom it was thought properly to belong, as an article of police and internal regulation, eſpecially as the parliament were prevented from ſitting by the violence of the plague: this ordinance was afterwards by ſtat. 2 Rich. II. ſt. 1. c. 8. made an act of parliament, and conſtitutes ſtat. 23 Ed. III. The contents of this act are well worthy of notice, as they are the firſt proviſions of this ſort, and laid the foundation of that ſyſtem of government to which this part of the community were ſubjected for many years after.

In the firſt place, it was ordained, that every man and woman, of whatſoever condition, free or bond, being of able body, and within the age of threeſcore years, not being engaged in merchandize, and not exerciſing any craft; neither having of his own whereof he might live, nor land of his own where he might employ himſelf in tillage, nor being in ſervice to any one; every perſon of ſuch deſcription, if required to ſerve in a ſtation that ſuited his condition, was to be bound to ſerve, when ſo required, upon the wages and terms that were uſual in the five or ſix years preceding the 20th year of the king; and any perſon ſo refuſing, upon his refuſal being proved by two true men before the ſheriff or the king's bailiffs, or the conſtables of the town, was to be taken to the next gaol, there to be detained till he found ſurety for ſerving on the above terms (*a*). Any workman or ſervant departing from his ſervice before the time agreed for, was to be impriſoned, and alſo thoſe who received or retained ſuch ſervant (*b*). All perſons paying or receiving, or demanding more than the above wages, were to forfeit double the ſum (*c*); and lords of towns or manors ſo doing, to forfeit treble (*d*). Moreover, any artificer

(*a*) Ch. 1. (*b*) Ch. 2. (*c*) Ch. 3. (*d*) Ch. 4.

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or workman refuſing to work for the prices uſual at the above-mentioned periods, were to be committed to the next gaol *(a)*.

In aid of this proceſs for the regulation of the poor, it was alſo enacted, that proviſions ſhould be ſold at a reaſonable price, having reſpect to the price they bore in the places next adjoining; and any perſon ſelling for more, was to forfeit to the party damnified double the price taken. Mayors and bailiffs of cities and boroughs were to have authority to enquire of ſuch offences; and if they neglected to act, and were convicted thereof before the king's juſtices, they were to forfeit treble the price to the party damnified, and to be fined to the king *(b)*. Again, to prevent the poor from being encouraged to take to an idle life, in preference to working at ſome trade, it was ordained, that none, under pain of impriſonment, ſhould give to ſuch as could labour any thing in the way of alms or charity, nor any wiſe favour them *(c)*. Becauſe it was found that people would not ſue for the forfeiture againſt ſervants and workmen taking more than the above-mentioned wages, it was afterwards ordained, that ſuch forfeiture ſhould be aſſeſſed by the king's officers, to go in alleviation of ſo much of the diſmes or quinzimes levied on the townſhip *(d)*.

In the 25th year of the king, the commons complained in parliament that the above ordinance was not obſerved; wherefore a ſtatute was made, ordaining further regulations on this ſubject. It was enacted, that carters, ploughmen, and other ſervants, ſhould be allowed to ſerve by a whole year, or by ſome other uſual term, and *not* by the day. All workmen were to bring their implements openly into towns, and there be hired in a common place, and by no means in a ſecret one *(e)*. Certain prices were fixed for a day's work of mowers, reapers, and others; and ſervants were to be ſworn twice a-year before the lords, ſtewards, bailiffs, and conſtables of every town, to obſerve theſe ordinances; and thoſe who refuſed to take ſuch oath, or to perform the work they engaged for, were to be put in the *ſtocks* by the above officers, for three days or more, or to be ſent to the next gaol, there to remain till they would juſtify themſelves *(f)*. As the wages of ſervants in huſbandry were ſettled by the above chapter, that of certain artificers, as maſons, carpenters, and the like, were likewiſe aſcertained; and power was given to the juſtices thereto aſſigned to lower the rate of ſuch wages at their diſcretion *(g)*. It

(a) Ch. 5. *(b)* Ch. 6. *(c)* Ch. 7. *(d)* Ch. 8. *(e)* Ch. 1. *(f)* Ch. 2. *(g)* Ch. 3.

was

was further enacted, generally, that *all other ſervants* not expreſsly named in the act, ſhould be ſworn before the juſtices to exerciſe their crafts as before the 20th year of the king; and any ſervant, workman, labourer, or artificer, acting contrary to ſuch oath, was to be puniſhed with impriſonment and fine, at the diſcretion of the aforeſaid juſtices (*a*). The above officers were to be ſworn before the juſtices to execute this ſtatute; and the juſtices at their ſeſſions were to make enquiry therein, and award proceſs of *exigent* after the firſt *capias* againſt offenders (*b*). The juſtices for the execution of this act were to hold their ſeſſions four times a-year at leaſt; that is, at the Annunciation, on St. Margaret, St. Michael, and St. Nicholas's day; and alſo as often as they in their diſcretions ſhould think needful (*c*). The commiſſion to execute the ſtatute of labourers was uſually directed to the ſame perſons who had the commiſſion of the peace; the due ordering of ſuch perſons as were the objects of this ſtatute being at this criſis one of the greateſt articles in the police.

AGAIN, by ſtat. 34 Ed. III. c. 10. it was ordained, that labourers and artificers who abſented themſelves from their ſervices ſhould be branded with a hot iron on the forehead with the mark of the letter *F*, to denote the *falſity* they had been guilty of, in breaking the oath by which they had bound themſelves, according to the former ſtatute, to ſerve; tho' this ſtigma might be diſpenſed with by the juſtices. Further, a ſervant, labourer, or artificer, who had abſented himſelf, might be demanded of the mayor or bailiffs of the place; and if they refuſed, they might be ſued before the *juſtices of labourers*, and, if convicted, were to forfeit 10l. to the king, and 100 ſhillings to the party grieved: this was to prevent ſuch fugitives from being harboured, and to intereſt all perſons in enforcing this ſtatute. To encourage this it was moreover ordained, by ſtat. 36 Ed. III. ſt. 1. c. 14. that the fines ariſing from the penalties inflicted under the ſtatutes of labourers, inſtead of going into the exchequer in part of the king's taxes, as directed by a former act, ſhould be diſtributed among the inhabitants by the collectors, under the controul and account of the juſtices of the peace.

TRADE and commerce had been patronized by our kings, and encouraged by our legiſlature, in the earlieſt times of our Hiſtory; of which, without looking further back, the indemnity and protection held forth to foreign merchants by *Magna Charta*, is a noble inſtance. The great productions of this country, and which were objects of commerce with foreign nations, Trade and commerce.

(*a*) Ch. 4. (*b*) Ch. 5, (*c*) Ch. 7.

were

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were wool and lead. Many regulations had been deviſed by our kings to make the advantage of this traffic center in the kingdom. Some of theſe conſiſted in markets or *ſtaples*, as they were called, where the buying and ſelling of theſe articles was put under certain terms: of theſe ſtaples, ſome were in England, and ſome beyond ſea. All theſe were experiments on the commerce of the kingdom, a ſubject not then thoroughly underſtood; and as the experience of times varied, the policy of national trade took a different turn. In the early part of this reign it was enacted, by ſtat. 2 Ed. III. c. 9. that the ſtaples, whether beyond ſea or in the kingdom, ſhould ceaſe; and that all merchants, as well aliens as natives, ſhould go and come with their merchandize in England according to the Great Charter.

In the 27th year of the king, other notions prevailed concerning the vent of the national produce; and it was thought expedient to confine the mart or *ſtaple* to certain great towns in England, where foreigners might reſort to purchaſe; and that no Engliſhman ſhould, under great penalties, export theſe commodities himſelf: thus it was thought this trade would bring more wealth into the country, than if tranſacted by the Engliſh on the Continent. Upon this idea was made *the ſtatute of the ſtaple*, 27 Ed. III. ſt. 2. a conſtitution containing a ſet of regulations for the eſtabliſhment and government of the ſtaple. As many of theſe are wholly of a mercantile import, and are now become obſolete, they are not objects of curioſity to an hiſtorical lawyer; but others, that are of a judicial nature, are not, becauſe out of uſe, leſs within the compaſs of this work, as they ſhew the turn and modifications which have, on particular occaſions, and for particular purpoſes, been given to our laws, to accommodate them to the ends of juſtice in all caſes. As the ſtaple was intended, in its very inſtitution, for the reſort of foreign merchants, it was wiſe and expedient that ſome mode of adminiſtering juſtice between parties ſhould be deviſed which would be more conſonant with the ideas of foreigners, and more adapted to the nature of mercantile tranſactions, for eaſe and diſpatch, than the common proceſs of the law. To theſe we ſhall principally confine ourſelves in conſidering the ſtatute of the ſtaple, noticing little more of the remainder of the act than will be neceſſary to make this intelligible.

The ſtatute of the ſtaple.

This ſtatute begins by enacting, that the ſtaple of wools, leather, woolfels, and lead, produced in England, ſhould be held at the following places: for England, at Newcaſtle upon Tyne, York, Lincoln, Norwich, Weſtminſter, Canterbury, Chicheſter, Wincheſter, Exeter, and Briſtol; for Wales, at Kaermerdyn;

Kaermerdyn; and for Ireland, at Dublin, Waterford, Cork, and Drogheda, and no where elſe; and all the above articles were to be brought to theſe places, and there ſold (*a*). In order that this whole buſineſs might be tranſacted at the ſtaple, it was ordained, that no merchant, Engliſh, Welch, or Iriſh, ſhould carry out of the realm any of the above articles, on pain of life and member, of forfeiture of the merchandize, and of other their goods and chattels, to the king, and their lands and tenements to the chief lord; and there were proper guards in the act to prevent any colluſion or fraud, by the interference of foreign merchants, to give colour to exports really made by Engliſh (*b*), the great object being to bring foreigners into the country.

In order that diſputes might be decided among merchants in the ſtaple according to their own ideas, it was enacted, that the juſtices of either bench, of eyre, of aſſiſe, or the marſhalſea, or any other juſtices, if they came to the places where the ſtaples were, ſhould not interfere or have cognizance of ſuch things as were within the juriſdiction of the mayor and miniſters of the ſtaple (*c*). And the juriſdiction of the mayors and conſtables of the ſtaple was declared in this way: they were to have cognizance within the town where the ſtaples were, of people, and of all manner of things touching the ſtaple. All merchants coming to the ſtaple, and their ſervants, were to be governed by the *law-merchant* in all things touching the ſtaple, and not by the common law of the land, nor by the uſage of cities, boroughs, or other towns; nor were they to implead, or be impleaded before the juſtices of ſuch places, in pleas of *debt*, *covenant*, and *treſpaſs*, of things touching the ſtaple; but ſhould implead all perſons, as well thoſe who were not of the ſtaple as thoſe who were, being found therein; and be impleaded only before the mayor and juſtices of the ſtaple, of all manner of pleas and actions, whereof the cognizance belonged to the ſtaple. Again, in all contracts whatſoever between merchant and merchant, or other, if one party was a merchant, whether the contract was made within the ſtaple or without; and alſo of treſpaſs done within the ſtaple to merchants or miniſters of the ſtaple by any ſtranger, or by any of them againſt a ſtranger; the plaintiff might either ſue in the ſtaple, or at common law.

In pleas relating to the king's houſe, the ſteward and marſhal of the houſhold were to ſit with the mayor, to ſee right done; but pleas of land were to be at the common law. If any merchant committed felony, or was ſlain, robbed, or maimed, the mayor of the ſtaple and other proper perſons

(*a*) Ch. 1. (*b*) Ch. 3. (*c*) Ch. 5.

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were to be aſſigned juſtices, to hear and determine the matter within the ſtaple according to the common law; and if an indictment was taken without the ſtaple of a fact committed within, it was to be tranſmitted to the mayor and the juſtices aſſigned within the ſtaple. If a matter was to be tried by an inqueſt within the ſtaple, and the parties were both ſtrangers, it was to be tried by ſtrangers; if denizens, by denizens: if one was an alien, and the other a denizen, then the inqueſt was to conſiſt of half denizens and half aliens (*a*).

In order that contracts made within the ſtaple might be better obſerved, and payments readily made, a courſe ſimilar to a ſtatute-merchant was directed. The mayor of the ſtaple was empowered to take recognizances of debts which any one would make before him, in the preſence of the conſtables of the ſtaple, or one of them. There was to be in every ſtaple a ſeal, to be kept by the mayor, and all obligations made upon ſuch recognizances were to be ſealed with that ſeal; by virtue of which ſealed obligation, the mayor might hold in priſon the body of the debtor, after the time of payment had incurred, if he was found within the bounds of the ſtaple; and there he was to be detained till he had made agreement with the creditor for the debt and damage: he might alſo take the goods found within the ſtaple, and deliver them, by true eſtimation, to the creditor, or ſell them to the beſt advantage, and pay the debt. In caſe the debtor, or his goods to the amount of the debt, were not found within the ſtaple, a certificate was to be made to the chancery, under the mayor's ſeal; upon which a writ would be iſſued to arreſt the debtor's body, without mainpriſe, and to ſeize his lands and tenements, goods and chattels: which writ being returned into chancery, with a certificate of the value of the lands and goods, thereupon due execution was to be made in the ſame manner as was preſcribed by the ſtatute-merchant; ſo that the creditor ſhould have an eſtate of freehold in the lands and tenements delivered to him by virtue of the proceſs, and recovery by writ of novel diſſeiſin, if ouſted; but the debtor was to have no advantage of the quarter of a year allowed by the ſtatute-merchant (*b*).

A piece of old law, which had been aboliſhed in the reign of Edward I. (*c*) and had been revived in this reign in the caſe of the Lombard merchants, was declared void in caſe of merchants ſtrangers generally; for it was ordained, that no merchant-ſtranger ſhould be impeached for another's treſpaſs or debt, wherein he was neither debtor, pledge, or mainpernor (*d*). It was

(*a*) Ch. 8. (*b*) Ch. 9. Part I. 405. (*c*) Part I. 376. (*d*) Ch. 17.

enacted,

enacted, that juſtice ſhould be adminiſtered in the ſtaple from day to day, and from hour to hour, whenever complaint was made, that merchants, whoſe occupations required them to be paſſing and repaſſing the ſea, might not be delayed unneceſſarily *(a)*. In every ſtaple town the mayor was to be choſen yearly; and he was to be well acquainted with the law-merchant, to qualify him for the government of ſuch a concern. There were to be at leaſt two conſtables. All complaints againſt the mayor and conſtables were to be redreſſed upon complaint to the chancellor and council *(b)*.

THESE are the judicial parts of the ſtatute of the ſtaple. Some ſmall alteration was afterwards made in the juriſdiction of the mayor and conſtables: for whereas it had been ordained, generally, that they ſhould have cognizance within the towns where the ſtaple was, of the people, and of all manner of things touching the ſtaple, and of felonies, mayhems, and treſpaſs done within the ſtaple, it was thus altered by ſtat. 36 Ed. III. ſt. 1. c. 7. namely, that they ſhould have cognizance only of debts, covenants, and contracts, and all other pleas touching merchandize, and ſurety of merchandize between merchants; but proceſs of felony, and all other pleas, as well within the ſtaple as without, were to be at the common law, as they were before the ſtatute of ſtaple; with this exception, that merchants *alien*, whether plaintiffs or defendants, might ſue plaints, as well of treſpaſs as any other matter, before the mayor of the ſtaple, by the law of the ſtaple, *or* at the common law. Some other ſtatutes were made reſpecting the trade of the ſtaple, which are not much worthy of notice; as ſtat. 28 Ed. III. c. 14, 15. Stat. 31. ſt. 1. c. 7.

OTHER laws were enacted for the encouragement of trade and manufactures, particularly that of woollen. It had hitherto been the courſe of trade, to ſend our wool to the Low Countries to be manufactured; but it being thought more conducive to the welfare of the people to manufacture it at home, ſome laws were made to give protection to ſuch cloth-makers as would come to reſide here from foreign parts *(c)*; and to reſtrain the wearing of any cloths but ſuch as were made in *England*, *Ireland*, or *Wales*. This meaſure was firſt begun in the 11th year of the king. When manufactures were thus ſet on foot, the next ſtep was to attend to the quality of their productions, which occaſioned the *ſtatute of cloths*, 25 Ed. III. ſt. 4. preſcribing the ſize, texture, and properties of cloths; and this act was followed by others *(d)*.

(*a*) Ch. 19. (*b*) Ch. 21. (*c*) Stat. 11 Ed. III. c. 5. (*d*) Stat. 27 Ed. III. ſt. 1. c. 4.

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IT was not to the natural productions of the king's dominions that the parliament confined their attention. It was endeavoured, in various ways, ſo to regulate other articles of commerce, both import and export, as to keep up the orderly and regular courſe which muſt be preſerved in commerce, if intended to be permanently beneficial. Among other circumſtances of trade, *foreſtalling* was reſtrained, as prejudicial to the fair trader. Foreſtallers of wine, victual, wares, and merchandizes, if attainted at the king's ſuit, or of any other, by indictment or otherwiſe, were to forfeit to the king the thing foreſtalled; and if they were ſold, and he had whereof to make fine, he was to ſuffer two years impriſonment (*a*). *Ingroſſing* likewiſe was reſtrained: merchants ingroſſing were to forfeit the thing ingroſſed, and pay a fine beſides (*b*). Beſides thoſe above-mentioned, to compel labourers and artificers to work, many laws were made to direct thoſe who were induſtrious to their proper object. Artificers and handicraftſmen were to confine themſelves to one trade only, in order that they might excel the better therein (*c*). The ſumptuary regulations that were made by ſtat. 37 Ed. III. may be conſidered as a branch of the laws concerning trade and manufacture. By that act, the apparel of almoſt all ranks of perſons in the ſtate, from knights and ſquires down to workmen and ſervants, was preſcribed; ſo that no whim or extravagance of dreſs might be indulged to the ruin of the wearer (*d*). This ſcheme of *œconomy* went ſo far as to the diet of the inferior ſort.

Foreſtalling.

WHILE ſo much ſolicitude was expreſſed for the intereſt and welfare of trade, no leſs regard was ſhewn to that great medium of it, *money*. No *ſterling*, nor ſilver in plate, nor veſſel of gold, was to be carried out of England, under pain of forfeiting the ſame, unleſs the king's ſpecial licence was had (*e*). No ſterling halfpenny or farthing was to be melted; and any goldſmith or other ſo doing, was to be committed to priſon till he paid to the king the value of that which he had melted (*f*). The importing of falſe money was, by ſtat. 9 Ed. III. puniſhed by forfeiture thereof; but we ſhall hereafter ſee that in the 25th year of the king it was made high-treaſon (*g*). Proper authority was given to ſearch for falſe money ſuſpected to be imported (*h*). Many other laws were made on the ſubject of the coin, all now of very little importance (*i*).

(*a*) Stat. 25 Ed. III. ſt. 4. c. 3. (*b*) Stat. 37 Ed. III. c. 5. (*c*) Stat. 37 Ed. III. c. 6. (*d*) Ch. 8, 9, 10, 11, 12, 13, 14, 15. (*e*) Stat. 9 Ed. III. ſt. 1. c. 1. (*f*) Ch. 3. (*g*) Ch. 2. Vid. poſt. (*h*) Ch. 9. 10, 11. (*i*) Stat. 25 Ed. III, ſt. 5. c. 12, 13. 20. Stat. 15 Ed. III. c. 6.

BEFORE

BEFORE we come to thoſe ſtatutes that relate to the adminiſtration of juſtice, it will be proper to mention ſome few which do not ſtrictly belong to that head, nor to any of the foregoing: one of theſe was for the denization of children born beyond ſea, one relating to *non-claim* upon fines, and another concerning fraudulent aſſurances.

THE ſtat. 25 Ed. III. ſt. 2. was made to remove ſome doubt which was entertained about the denization of Engliſh children born out of the kingdom: for which purpoſe the ſtatute explicitly declares the law of England always to have been, that the children of the kings of England, whether born in the kingdom or without, ought to have the inheritance after the death of their anceſtors: and reſpecting others, it declares, generally, that all children inheritors who ſhould thenceforth be born without the king's ligeance, if their fathers and mothers at the time of their birth were of the faith and allegiance of the king of England, ſhould enjoy the ſame benefits and advantages, to have and bear their inheritances within the king's allegiance, as well as thoſe born within the allegiance of England; provided their mothers paſſed the ſeas with the licence and wills of their huſbands. And becauſe there was ſome doubt about children born at *Calais*, that place not being *out* of the king's ligeance, it was declared by ſtat. 42 Ed. III. c. 10. that they ſhould be held within the benefit of the above law.

Children born out of the realm.

IT was the old law of the land, that a fine properly levied in court ſhould bind all parties who did not make their claim within a year and a day; and this was recognized and confirmed by the ſtatute of *Modus levandi fines*, 18 Ed. I. (*a*). The great principle upon which *fines* were to be defended, was the peace and quiet thereby given to the poſſeſſion of property; tho' a ſolicitude not to preclude any one from obtaining juſtice, if he had a lawful claim, dictated the indulgence of a year to make it in. In this reign, the deſire of being always at liberty to do juſtice, ſeems to have got the aſcendant over that to preſerve quiet; for it was at the diſtance of twelve years from the petition for that purpoſe (*b*), ordained by ſtat. 34 Ed. III. c. 16. that the plea of *non-claim* of fines ſhould not be taken nor holden for a bar in time to come. The endleſs litigation to which property was ſubjected after this law, produced a repeal in the reign of Henry VII. when fines, as to this point, were put upon their old footing.

THE laſt act but two in this long reign is upon a ſubject which will be more fully diſcuſſed in the ſubſequent parts of our Hiſtory; namely, *the poſſeſ-*

(*a*) Part I. 450. (*b*) Cott. Abr. 22 Ed. III. 21.

ſion

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ſion of land by one man to the uſe of another. In what degree this practice of modifying property had obtained at the time of which we are now ſpeaking, may perhaps be collected from a recital of the ſtatute itſelf. The ſtat. 50 Ed. III. c. 6. complains, that many people inheriting divers tenements, borrow goods in money or merchandize, and then give their tenements and chattels to their friends, *by colluſion thereof to have the profits at their will*, and afterwards flee to the franchiſe of *Weſtminſter*, of *St. Martin's-Le-Grand* of *London*, or other privileged place, and there live a great time *with high countenance of another man's goods and profits of the ſaid tenements and chattels*, till their creditors are glad to take a ſmall part of their debt, and releaſe the remainder. This was the grievance meant to be remedied; for which end the ſtatute ordains, that ſhould ſuch gifts be found to be made by colluſion, the creditors ſhould have execution of the tenements and chattels as if no ſuch gift had been made. One would have thought a ſtroke like this, as it wholly deſtroyed the end of ſuch confidential gifts, needed not to have been repeated; but ſuch was the ingenuity and perſeverance of mankind, that theſe colluſive gifts rather increaſed after this act, and were carried to ſuch lengths as to baffle the operation of many ſtatutes framed more ſpecially and upon better experience than the preſent *(a)*.

To the account that is to be given of the alterations made in the adminiſtration of juſtice, it may be convenient to prefix a ſhort view of the laws enacted for the better regulations of ſome offices immediately connected with, and aſſiſtant to, courts of juſtice; ſuch as thoſe of the coroners, ſheriffs, bailiffs, and the like.

Of ſheriffs.

FIRST, of ſheriffs. The ſtatute of Lincoln, 9 Ed. II. ſt. 2. directing that ſheriffs, hundredors, and bailiffs, ſhould be choſen from ſuch perſons as had lands in the ſame ſhires or bailiwicks, and that ſheriffs and bailiffs of fee ſhould cauſe their counties and bailiwicks to be kept by ſuch as had lands therein, was a proviſion ſo well calculated to promote the dignity of the office, that it was ordained, by ſtat. 2 Ed. III. c. 4. and in the next parliament by ſtat. 4 Ed. III. c. 9. to be ſtrictly obſerved; and the ſame was more explicitly re-enacted by ſtat. 5 Ed. III. c. 4. by requiring the lands to be ſufficient to anſwer to the king and his people, if grieved.

THE farming of counties and hundreds led to much oppreſſion and diſorder. It ſeems, that in former times all the counties in England were aſſeſſed to a certain ferm; and all the hundreds and wapentakes in the ſheriff's

(*a*) Vid. poſt.

hands

hands were rated to this ferm. Afterwards, ſays the act, approvors were ſent into ſome counties, which increaſed the ferms of ſome hundreds and wapentakes, notwithſtanding that the crown had, at divers times, granted out parts of the ſame hundreds and wapentakes for the old ferms only; but now of late the ſheriffs had been charged with the whole increaſe, amounting to a great ſum, which was a ſort of diſheriſon to ſheriffs, and tending to the oppreſſion of the people. It was thought this would be remedied by annexing to the counties ſuch hundreds and wapentakes as had been lett by the preſent king; and this was done by ſtat. 2 Ed. III. c. 12. which alſo directs that they ſhould never again be ſevered. Again, becauſe ſheriffs had lett hundreds and wapentakes at ſo high a ferm that the bailiffs could not levy the ferm without extortion and mal-practices, it was enacted by ſtat. 4 Ed. III. c. 15. that ſheriffs ſhould lett them at the old ferm, and not above; and if they did, they were to be puniſhed by the juſtices.

To prevent one inſtance of extortion, it was enacted, by ſtat. 4 Ed. III. c. 10. that ſheriffs and gaolers ſhould receive and ſafely keep all thieves and felons delivered to them by conſtables and townſhips, without taking any thing for ſo doing; and they were to be puniſhed by the juſtices of gaol-delivery, if they acted otherwiſe.

In the 14th year of the king, the office of ſheriffs underwent a fuller conſideration, and ſome proviſions of a more general nature were deviſed for the reformation of it. It had been the practice for ſheriffs ſometimes to have grants of their bailiwick from the king for term of years, which was found to render ſheriffs ſecure in their miſconduct, and evils became thereby more inveterate. It was now ordained, that in future no ſheriff ſhould continue in office more than a year, and then a new one ſhould be appointed in his place by the chancellor, treaſurer, and chief baron of the exchequer, taking to them the two chief juſtices, if they were preſent; and this was to be on the morrow of *All Souls*, at the exchequer *(a)*. Beſides re-enacting the before-mentioned proviſions about letting hundreds to ferm, it was ordained, that ſheriffs ſhould put in bailiffs and hundredors having lands within the bailiwick for whom they would anſwer. The ſheriffs' buſineſs was to be done by ſuch bailiffs and hundredors and their under-bailiffs, without any *out-riders*, as they were called, and others who had lately been employed by ſheriffs, and had committed great exceſſes: the ſame of *bailiffs-errant*, as they were

(*a*) Ch. 7. confirmed by ſtat. 28 Ed. III. c. 7.

called

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called, who were no longer to be in counties, but where they were uſed in the time of Edward I. and no more than one in a county; theſe *bailiffs-errant* and *out-riders* being deputies to the above officers, and as leſs reſponſible, ſo more iniquitous in their employments. All others who had bailiwicks or hundreds in fee, were to put in ſuch bailiffs as they would anſwer for; and if they lett them, it was to be on the old ferm. If ſheriffs, or their fermors, offended againſt this act, the hundreds and wapentakes where the default was, were to be ſeized into the king's hands, and themſelves committed to priſon till they had made fine to the king: the ſame of thoſe who had bailiwicks in fee, upon default of their bailiffs (*a*): ſheriffs were alſo to put in ſuch gaolers as they would anſwer for (*b*).

NOTWITHSTANDING *Magna Charta* had directed that ſheriffs ſhould hold their tourn after *Eaſter*, and after *Michaelmas*; yet, it ſeems, ſome ſheriffs, not attending to that act, held their tourn ſometimes in *Lent*, and ſometimes after the *Yule of Auguſt*; ſeaſons heretofore ſet apart for devotion and harveſt. It was again enacted, by ſtat. 31 Ed. III. ſt. 1. c. 15. that the tourn ſhould be held twice a-year; once within the month after *Eaſter*, and once within a month after *Michaelmas*; and if a ſheriff held it any otherwiſe, he was to loſe his tourn for the time. The laſt act about ſheriffs in this reign, was ſtat. 42 Ed. III. c. 9. which, beſides ſome directions about tranſmitting their eſtreats into the exchequer, ordains, not only that no ſheriff, but that no under-ſheriff, nor ſheriff's clerk, ſhould abide in his office more than a year.

As to coroners, it was enacted by ſtat. 14 Ed. III. ſt. 1. c. 8. that no coroner ſhould be choſen unleſs he had lands in fee ſufficient in the ſame county, ſo as to be able to anſwer the people. Again, all coroners were to be choſen in full county by the commons of the county, of the moſt meet and lawful people that were to be found in the county, to execute the office, except in caſes where the king or lords, by their franchiſe, had a right to appoint (*c*).

SEVERAL regulations were made by the parliament in this reign, for the better and more regular adminiſtration of juſtice. Theſe conſiſted partly in a new diſpoſition or arrangement of the courts, and partly in providing new remedies. We ſhall firſt ſpeak of the former.

Judicature in parliament.

THE moſt ſtriking change made in any of the courts was that which regarded the high court of parliament. The judicature exerciſed by this ſupreme tribunal has been explained in the former part of this Hiſtory (*d*). What was then ſaid, was founded upon the teſtimony of very ſcanty materials, confirm-

(*a*) Ch. 9. (*b*) Ch. 10. (*c*) Stat. 28 Ed. III. c. 6. (*d*) Part I. 43.

ed

ed by the analogy obſerved in cotemporary judicatures, and the experience of later times. To thoſe later times we are now arrived. In the reigns of Edward I. II. and III. we find records of proceedings in parliament, which inconteſtibly verify what was before pronounced on the judicial character of this aſſembly, and furniſh materials for forming an accurate judgement of its judicature, whether civil or criminal: from them alſo may be collected ſome intimation of the judicature of the council; and the way in which that and the courts of exchequer, king's-bench, chancery, and common-pleas, were connected with, and dependent upon, the court of parliament. If we had adhered in this inſtance to the method we have rigorouſly purſued in all other parts of our hiſtorical deduction, that is, to take notice of juridical facts as early as the remains of antiquity afford any notice of them, we ſhould have introduced the preſent obſervations in the reign of Edward I.; but this was deferred to avoid repetition, and to accommodate the narrative to the reader's attention; which, as it was neceſſarily to be much engaged in this reign on the alterations made in the court of parliament, it was thought would be better prepared for ſuch alterations by a ſtatement of the whole ſubject at the time, than by ſcattering it in different places. It muſt therefore be underſtood, that what is now ſaid of the juriſdiction of the court of parliament is equally applicable to the reigns of Edward I. and II. and indeed, as we conjecture, to all the reigns preceding, up to the origin of the Norman conſtitution.

THE great extent of the juriſdiction of parliament in judicial matters, ſeems owing to the idea of ſuperintendence and ſupremacy attributed to that aſſembly by the people: it was thought, that the parliament was to redreſs all wrongs, to remedy all abuſes, and remove all difficulties, with which a man was preſſed either in his perſon or property. In conſequence of this notion, it happened, at every meeting of parliament, that *petitions* poured in from all quarters, not only upon ſubjects of public and national concern, but for relief in private affairs: theſe petitions were exhibited by all ſorts of perſons, upon all ſorts of matters, and to obtain every ſpecies of relief which the petitioners thought moſt deſirable in their ſituation. When petitions were ſo numerous, and the objects of them ſo multifarious, it could not but happen that many were frivolous, and many belonging to another juriſdiction. To diſtinguiſh between thoſe which were properly within the cognizance of the parliament, and thoſe that were not; and alſo in order that thoſe which belonged to other courts might be duly remitted thither; certain prelates, earls, barons, and others, were appointed in every parliament, to be *recievors, and*

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tryors of petitions. Theſe were to examine all petitions, and upon full conſideration thereof, were to indorſe upon them what courſe was to be purſued to redreſs the petitioner; and ſo directed him, according to the nature of the caſe, either to the full parliament, to the council, to the chancery, or to ſome of the other courts. It was for this reaſon that the recievors and triors of petitions are ranked by Fleta among the king's court; tho', as he ſays, their buſineſs was not to determine, but only to hear and examine, and make their report thereon (*a*). This is the outline of the court of parliament, the features of which deſerve further conſideration.

THERE was one circumſtance in common to all theſe petitions, that they were addreſſed either *a noſtre ſeignour le roi, et a ſon conſeil, monſtre*, &c. or to the king ſingly, without naming the council at all; tho' the former was the moſt common form. As to the matter of theſe petitions, it will be difficult and unneceſſary to ſpeak of them particularly: the curious reader, by caſting his eye over the parliament-rolls of this and the two preceding reigns, will judge whether what was above ſaid of the extent of this judicature is well founded. Petitions were infinite as to the particular object of them; but they may be divided into two general heads; namely, ſuch as were the original commencement of a ſuit, and ſuch as complained of error or delay in any ſuit depending in the courts below.

THE manner in which petitions were treated, is beſt ſeen by the anſwers they received. Petitions that were originally for redreſs, very commonly contained matter which was properly cognizable only at common law; in ſuch caſe *the recievors and tryors*, upon examination of the matter, would indorſe the following anſwers: *Sue a la comein ley, ſue brief de treſpaſs, et aixi de manace s'il vou* (*b*); and the like. If it was in ſome matter of the revenue, the anſwer would be, *ſoit mande as treſorer, et barons de l'exchequer, que viewes, et ſerches les roules et remembrances de l'exchequer et aiſſi appellé aucuns de juſtices, s'il beſoigne, facent outre en diſcharge le dit —— et que ley et reſon demandent* (*c*). If the petition related to any of the king's charters or grants, the reference was uſually to the chancery, which ſeemed to have a nearer connection with the council than the other courts. An anſwer to one petition is thus: *Soit ceſte petition mande en chancellerie, et illoeq; ſoient bons genz aſſignez d' enquere, en la preſence des auſcuns de la chambre s'ils y veuillent eſtre, ſi les choſes contenue en la petition ſoit veritables: et l' enqueſte iſſint priſe, et retourne en chauncellerie, le chaunceller vene le fait*, &c. (*d*) *et appellez le ſeneſchal de la*

(*a*) Part I. 465. (*b*) 21 Ed. III. Pet. Parl. 24. No. (*c*) Ibid. (*d*) 21 Ed. III. Pet. Parl. 69.

chambre,

chambre, ou ſon lieutenant, et les ſerjeantz le roi, et auſcuns des juſtices, ſolont ce qu'il verra que ſoit a faire, et oiez les reſons pur le roi, et pur la partie, face outre droit et reſon. Again: *Soit ceſte petition maunde en chancellerie, et illoeq; appelle le counſail la roigne, et oiez les reſons d'une part et d'autre ſoit ent outre fait droit (a).* If it was a matter proper for the cognizance of the council, an anſwer to this effect uſed to be given: *Veigne devant la counſaile et declare la matere contenue en la petition.*

THESE are ſome inſtances, out of many others, of the manner in which the parliament diſcharged certain applications for redreſs. But the petitions themſelves are rather examples of what the people expected from the parliament, than of the juriſdiction really exerciſed by it. Among the petitions to parliament we find ſome indorſed with theſe anſwers: *Coram rege & magno concilio*; and ſometimes an anſwer concluded with theſe words, *et iſſint fuit reſpondu en plein parlement.* It ſhould ſeem, theſe and the like anſwers ſignified that the parliament had heard and decided upon the petition judicially, by a ſolemn judgment and an award made upon it. Matters that were determined in this manner by the parliament were ſuch for which the common law had no remedy, or were of too great importance to be referred to the council, which was the other tribunal, next the parliament, for ſupplying the defects of the common law. In this way were *original* petitions in parliament exhibited and diſpoſed of.

THE manner in which petitions for direction in ſuits depending in the courts were entertained by parliament, will appear from a few inſtances where ſuch interpoſition was made. In the 21ſt year of this reign there is a petition to the king and council, ſtating that the parties were impleaded by writ of *ſcire facias* before the juſtices of the common bench; which plea had been ſix years depending in judgment, and the judges could not yet agree upon the judgment, tho' they had been frequently commanded by the king ſo to do; therefore the petitioners, who were greatly aggrieved by ſuch delay, prayed the king that he would command the chancellor, or the clerk of the privy-ſeal, to ſend a writ to the juſtices to cauſe the record in the ſaid plea to come into full parliament, that the matter upon which they doubted might be debated before the peers of the land, and ſo might be finally determined by their advice and that of other learned men (*b*): the anſwer to which was, that the record and proceſs ſhould be brought before the council, and upon view thereof due diſcuſſion ſhould

(*a*) 21 Ed. III. Pet. Parl. 70. (*b*) Ibid. 82.

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be had. Many inſtances of ſuch applications to parliament might be produced (*a*).

It was not only by petition of the parties that ſuits depending in the courts below were brought into parliament, but alſo on the motion of the judges themſelves, who in caſes of doubt and difficulty would rather take the advice of the parliament than hazard their own judgment. In the 40th year of this king (*b*), *Thorpe* ſays, that he and Sir *Hugh Green* went together to the parliament, where there were preſent at leaſt twenty-four biſhops and earls, and aſked the opinion of thoſe who had been the makers of the late ſtatute of jeofail, concerning the alteration of a record. "At another time," the ſame judge ſays (*c*), (that is, on the occaſion abovementioned) "we "were commanded by the council, that when any caſe of doubt ſhould hap- "pen, we ſhould not go to judgment without good advice: therefore, "(adds he, in the caſe then before the court) go to the parliament (*d*), "and as they will have us do, we will, and otherwiſe not." Inſtances of this kind of reference were frequent in this reign, when the conſtant ſitting of that aſſembly afforded more opportunity for this intercourſe than in any of the former periods. It was in the ſpirit and in purſuance of the practice then in uſe, that the famous ſtatute of treaſon, ſtat. 25 Ed. III. ordains, that when any new caſe of ſuppoſed treaſon ſhould ariſe, not preciſely within the terms of that act, the judges ſhould not proceed upon their own conceptions, but ſhould take the opinion of the next parliament.

What we have been ſaying of petitions in parliament related chiefly to civil affairs; but it was not leſs common to petition parliament in criminal matters; when the parties, according to their caſe, were directed to ſue a writ of oyer and terminer, or take ſuch other ſteps as the common law preſcribed. But criminal proſecutions were inſtituted in parliament in another way than by petition. The lords conſtituted a great inqueſt, which was to preſent and try each other. There are numberleſs inſtances of this juriſdiction all thro' this reign. In the fourth year we find a ſtring of articles charging *Roger Mortimer* with certain treaſons, felonies, and miſdemeanors. At the end of the record it is ſaid, that the king charged the earls, barons, and peers of the realm, with the ſame; upon which the ſaid earls, barons, and peers, having examined all the articles, returned back to the king in the ſame parliament, and all pronounced by the mouth of one of

(*a*) Cotton Abridg. pa. 30. vid. a long caſe reported. (*b*) 40 Ed. III. 34.
(*c*) 39 Ed. III. Mich. 35. (*d*) *Counſel.*

them,

them, that the matter contained in thoſe articles was notorious to them and to all the people : wherefore they, the ſaid earls, barons, and peers, as judges of parliament, by aſſent of the king in the ſame parliament, awarded and adjudged, that the ſaid Roger ſhould be drawn and hanged as a traitor; and order was accordingly given to the earl marſhal to execute the ſentence (*a*). It appears very clearly from this caſe *who* were the judges in ſuch parliamentary trials; namely, the lords were to ſit in judgment on each other, as peers. But the enormity of the offence which was to be puniſhed in this parliament, and which was nothing leſs than the murder of the late king, excited a ſort of reſentment in the parliament, and carried them further than the lawful bounds of their juriſdiction; for they paſſed ſentence of death upon ſeveral commoners. However, to prevent this being drawn into precedent in future, the parliament cauſed the following memorandum to be entered on the roll : That it was aſſented and agreed by the king, *et toutz les grantz*, in full parliament, that tho' the peers had taken upon them to give judgment, with the king's aſſent, upon certain perſons who were not peers, yet no peers in future ſhould be held or charged to give judgment on any other than their peers (*b*).

In conformity with this reſolution, it appears in the ſame parliament, among the *placita coronæ*, when Sir *Thomas Berkeley* was to be tried for the ſame offence of murdering the king, and he alledged he was out of Berkeley-caſtle at the time, and therefore not conſenting to the murder, that the record runs thus : *de hoc, de bono et malo ponit ſe* SUPER PATRIAM. *Ideò venerunt inde* JURATORES *coram domino rege in parliamento ſuo*, &c. (*c*)

All theſe proſecutions in parliament were brought forward by articles exhibited; but who were the perſons appointed to exhibit ſuch articles, and to ſtand forth as proſecutors, does not appear. Towards the latter end of this reign the commons took this burthen upon themſelves; and among their other petitions, began to exhibit *accuſations* for crimes and miſdemeanors againſt offenders who were thought to be out of the reach of the law. In theſe proſecutions the king and lords were conſidered as judges. The firſt of theſe is in the 42d year of the king, when Sir *John Lee* was impeached by the commons for his mal-practices while ſteward of the houſhold, and fraud in ſome private tranſactions; concerning all which he was heard before the *great council* (*d*). In the 50th year the commons preferred impeachments againſt many delinquents, which were tried by the lords. Thus was this for-

(*a*) 4 Ed. III. 1. Roll. Parl. (*b*) 4 Ed. III. Roll. Parl. 6. (*c*) Ibid. 16.
(*d*) 42 Ed. III. Rot. Parl. 20:

midable

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midable mode of proſecution by impeachment of the commons, firſt ſet on foot.

Judicature in council.

THE next tribunal in authority to the parliament was *the council.* As the parliament was often called by this name, and there was beſides more than one aſſembly of perſons called *the council,* much difficulty has ariſen in endeavouring to diſtinguiſh between them. We have ſeen, that petitions to parliament in private matters were addreſſed *a noſtre ſeignour le roi, et a ſon conſeil.* The king had a council which conſiſted of all the lords and peers of the realm, which, it ſhould ſeem, were called together by him at times when the parliament was not ſitting: this was called the *grand council,* as well as the parliament (being probably the original *commune concilium regni,* before the commons were called thither), and was ſo called to diſtinguiſh it from the other *council,* which the king uſed to have moſt commonly about him for advice in matters of law. This laſt council (which in effect approached very near to what has ſince been called the *privy council*) conſiſted of the treaſurer, chancellor, juſtices, barons, the keeper of the rolls, the maſters in chancery, the chamberlains of the exchequer, juſtices in eyre, juſtices aſſigned, juſtices in Wales, the king's ſerjeants, the ſecretaries of ſtate, clerk of the privy-ſeal, clerk of the wardrobe, and ſuch other perſons as the king was pleaſed to adviſe with (*a*). In both theſe councils the king ſat as judge, and cauſes heard there were ſaid to be *coram rege in concilio.*

THE nature and conſtitution of the former of theſe two councils is leſs known to us than that of the latter: but it may be diſcerned, that both of them kept up a very cloſe correſpondence with the parliament; ſo that cauſes were adjourned from thence into either of the councils, and were there heard and finally determined. Inſtances of ſuch adjournments into the inferior of theſe councils were very common, on account of its being almoſt always in readineſs to be called together, the king being ſeldom without ſome of his council about him: ſuch references are to be found almoſt in every page of the parliamentary rolls. But adjournments into the *great council* were not ſo common, as it was called only on great occaſions, or perhaps was kept ſitting after the diſmiſſion of the commons, to make ordinances, or determine matters that were agitated and remained unfiniſhed in the laſt parliament. The impeachment before-mentioned which the commons preferred againſt Sir *John Lee* in the 42d year of the king, was finally determined by the *great council* (*b*): and probably many other matters which appear by the rolls to have been determined by *the council,* might

(*a*) Vid. ſtat. 14 Ed. III. ſt. 1. c. 5.

(*b*) Parl. Rot. 27.

have

have been heard by the *great council*; but owing to the appellation being equivocal, it is not now eaſy to diſtinguiſh the one from the other. The method of addreſs to the two councils was, like that to the parliament, by petition; and the objects of juriſdiction there were ſuch queſtions, whether civil or criminal, for which the law had not ſufficiently, or not at all, provided. The king's council uſed to ſit in different *chambers* that were about the palace; ſometimes *en la chambre de peincte*; ſometimes *en la chambre blanche*, or *en la chambre de marcolf*; and, as ſome ſay (*a*), *en la chambre des etoiles*; to which place of their ſitting the general return of certain writs in this reign, *coram nobis in camerâ*, referred (*b*); and it very often ſat in the *chauncery*.

HAVING premiſed theſe obſervations upon the ſtate of the judicature in parliament and the council, the alterations made in both by ſome ſtatutes paſſed in this reign will be better underſtood. There was only one ſtatute that at all affected the judicature of the parliament; and this was ſtat. 14 Ed. III. ſt. 1. c. 5. and was intended partly to relieve that aſſembly from the burthen of anſwering all applications from the courts below, and partly to render the courſe of obtaining advice and direction in judicial matters more regular and eaſy, by eſtabliſhing a ſort of perpetual committee of parliament for that purpoſe. The ſtatute complains, that many miſchiefs happened thro' delays of judgment, as well in the chancery as in the king's-bench, common bench, exchequer, before juſtices aſſigned, and other juſtices appointed to hear and determine; which delays were occaſioned by the difference of opinions among the judges, and other cauſes. To remedy this in future, it was ordained, that henceforth there ſhould at every parliament be choſen a prelate, two earls, and two barons, who ſhould have commiſſion and power from the king to hear by petition delivered to them all complaints of delays or grievances done to them; and ſuch lords were to have power to cauſe to come before them at Weſtminſter, or elſewhere, the tenor of records and proceſſes of ſuch judgments ſo delayed, and to cauſe the juſtices who were then preſent to come before them to hear the cauſe and reaſons of ſuch delays: which cauſe and reaſons being ſo heard, they, by advice of themſelves, and that of the chancellor, treaſurer, the juſtices of the one bench and of the other, and other of the king's council, as many and ſuch as they ſhould think convenient, were to proceed *to take a good accord, and make a good judgment*; and according to ſuch accord ſo taken, the tenor of the record, together with the

(*a*) 4 Inſt. ch. 5. which refers to a clauſe Roll that I cannot find. (*b*) Vid. Parl. Rot. paſſim,

judgment

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judgment ſo accorded, were to be remanded before the juſtices where the plea depended, for them to give judgment immediately according to the record. However, if the difficulty ſeemed ſo great that it could not well be determined without aſſent of parliament, it was enacted, that the ſaid tenors ſhould be brought by the ſaid choſen lords to the next parliament, and there a final accord and judgment be given, according to which the judges ſhould be commanded to proceed to give judgment. To put this act into immediate execution, a commiſſion was given to the archbiſhop of Canterbury and four lords.

THUS was a ſubſiſting council of reſort provided during the intervals of parliament; but the ſupreme court of parliament, which had diſtruſted the judges, would not confide their whole authority even to this delegation out of their own body, but by the expreſs proviſion of this ſtatute reſerved to themſelves the final deciſion in all points of difficulty and doubt. It appears, even after this act was paſſed, that the judges did not ceaſe to recur immediately for advice to the parliament *(a)*; and as there are thro' all the rolls many inſtances of ſuch petitions to the parliament, it may be doubted whether this ſtatute and the eſtabliſhment thereby appointed were much attended to.

IF the intercourſe between the courts of ordinary juſtice and the houſe of lords was endeavoured to be checked by the former ſtatute, the ſuprême judicature exerciſed by the council, in matters both civil and criminal, was put under ſome reſtraint by ſeveral ſtatutes. Theſe reſtraints were at that time conſidered as in ſupport of the Great Charter of Liberties, which had forbid all impriſonment or diſſeiſin of freehold but by the judgment of a man's peers, or the law of the land: the proceſs and proceeding before the council were looked upon as derogatory to this great ſtandard of common juſtice, and therefore not to be tolerated.

THE jealouſy entertained of the power of the council was juſtified by the preſent ſtate of our judicial polity, compared with what it had been in times leſs ſettled and poliſhed. The judicature of the king in council had been admitted for wiſe reaſons originally, tho' as wiſe ones might now be urged for its diſſolution. It was principally calculated for times of diſorder, when the common courſe of juſtice was circumſcribed to very narrow bounds, and ordinary judges were unable to enforce the execution of law againſt powerful ſubjects. When the ſtate of ſociety was altered, and things grew more

(*a*) Vid. ant. 84.

ſettled,

ſettled, ſuch ſupreme powers ſeemed no longer neceſſary. During this and the preceding reigns, the common law had arrived to ſuch a degree of perfection, that arguments from the incompetency or defect of ordinary proviſions were now of no avail: the remedies of the law were ſo encreaſed in number, and their execution ſo effectually ſecured, that it was no longer requiſite to recur to the judicial character of the king, to ſupply by his prerogative the inſufficiency of law. All injuries now found redreſs in the courts below; and to recur to any other juriſdictions was thought unneceſſary, dangerous, and burthenſome to the ſubject.

SUCH arguments of convenience and propriety co-operating with the fear impreſſed by an authority that was as much or more of a political than judicial nature, contributed to raiſe a clamour againſt the council, and occaſioned ſeveral acts of parliament, which diſcountenanced a good deal any unneceſſary application to the king in council, and allowed it only on ſuch terms as it was thought might prevent an abuſe of it. We ſhall conſider theſe parliamentary regulations in the order in which they paſſed.

THE firſt ſtatute on this ſubject was made in the 25th of Ed. III. *(a)* which enacts, that, in purſuance of the Great Charter, none ſhould thenceforth be taken by *petition* or *ſuggeſtion* made to the king or his council, unleſs it was by indictment or preſentment of good and lawful people of the ſame neighbourhood where the fact was done, in due manner, or by proceſs of writ original at the common law. Thus far of criminal inquiries: and further, as to civil matters, it enacts, that none ſhould be ouſted of his franchiſes or his freehold, unleſs he were duly brought in to anſwer, and was forejudged of the ſame *by the courſe of the law*; and if any thing was done otherwiſe, it ſhould be redreſſed and held void. It was thought not ſufficient to declare ſuch proceedings to be void; but ſuggeſtions to the king being often falſe or malicious, it was enacted, by ſtat. 37 Ed. III. c. 18. that, to prevent ſuch for the future, all perſons making ſuggeſtions ſhould be ſent with them before the chancellor, treaſurer, and his council, there to find ſurety for proſecuting their ſuggeſtions; and if the ſuggeſtions were *found evil*, that the party ſhould incur the ſame penalty as the adverſary would if convicted, and then the matter ſhould be left to the proceſs of the law; which latter clauſe was repealed in the next year, and inſtead thereof it was ordained *(b)*, that a perſon failing in proof of his ſuggeſtion, according to the former ſtatute, ſhould be commanded to priſon till he had agreed with the defendant for

(*a*) St. 5. c. 4. (*b*) Stat. 38 Ed. III. ſt. 1. c. 9.

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the damage and ſlander he had ſuſtained, and beſides, made ranſom and fine to the king.

EITHER the evil was not abated by theſe ſtatutes, or the uneaſineſs of the people required further declarations of the parliament on this ſubject: we find, about four years after this, an act which ſeems to give a finiſhing blow to all extraordinary judicature whatſoever, whether civil or criminal. The commons having again complained that people were brought before the king's council by writ, *and otherwiſe upon grievous pain* (*a*) againſt the law, it was enacted, by ſtat. 42 Ed. III. c. 3. that no man be put to anſwer before juſtices without preſentment or matter of record, or by due proceſs and writ original, according to the old law of the land; and that any thing done to the contrary ſhould be void. No doubt ſome plauſible exceptions were deviſed to prevent the full operation of this ſtatute, as the council ſtill continued the exerciſe of its judicial authority both civil and criminal.

THUS much has been ſaid of the ſupreme courts held *coram rege* in parliament and in council. We now proceed to the inferior courts. If theſe were taken in the order to which they ſeem intitled by the dignity of their ſtyle, we ſhould firſt ſpeak of the two courts *coram rege*; that *ubicunque fuerit in Angliâ*, and that *in cancellariâ*. But we ſhall firſt ſpeak of the court of the ſteward and marſhal; a tribunal, as we have ſeen, once of great eminence, but now ſinking both in juriſdiction and importance, owing to the increaſing authority of the king's-bench, which derived perhaps ſome of its cognizance from this court.

The court of the ſteward and marſhal.

IT was enacted, by ſtat. 5 Ed. III. c. 2. that inqueſts before the ſteward and marſhal of the king's houſe ſhould be taken by men of the country thereabouts, and not by men of the king's houſe, except in caſes of contracts, covenants, or treſpaſſes made by men of the king's houſe of the one part and of the other, and within the houſhold, according to the ſtatute made in the time of Edward I. (*b*). And it was ordained, that if any one would complain of error in this court, he ſhould have a writ to remove the record and proceſs before the king in his place, that is, in the king's-bench; which now was confirmed in that appellate juriſdiction, which the court of the ſteward and marſhal poſſeſſed once over the other courts. This act was confirmed, or rather re-enacted, in ch. 2. and 3. of ſtat. 10 Ed. III. The re-enacting the proviſions of this act, and the petitions of the commons againſt this court during this reign, ſhew, that its

(*a*) *Sur greve peine.* (*b*) Part I. 457.

juriſdiction

juriſdiction created great jealouſy and diſcontent. In the 25th year of the king, the commons prayed, that none of the king's ſervants implead any one in the marſhalſea; which was refuſed; as indeed it would have been confining this court wholly to thoſe of the houſhold (*a*). In the 50th year, it was prayed, that the ſteward and marſhal ſhould hold plea of nothing but what was contained in the ſtatute of *articuli ſuper chartas*; and that the limit of twelve miles might be reckoned either from the king's preſence, or the place of the houſhold, and not from both; and that the ſteward ſhould keep his ſeſſion within three miles of the king's preſence. To this it was anſwered, that the twelve miles ſhould be reckoned either from the king's preſence, or from the houſhold, and not from both (*b*). In the ſame year it was ſtated to the parliament by the commons, that there was great complaint of the marſhal's court throughout the realm; which grievances the parliament prayed might be ſpecified (*c*). In the following year it was prayed, that the marſhal might not intermeddle in that part of Southwark which was called guildable (*d*); and again, that it might be declared by ſtatute what pleas the marſhal ſhould hold, and that preſcription might be allowed before him, as well as before other juſtices of the king (*e*). But after all theſe complaints, this court was left to continue upon the above ſtatutes and the old common law.

The king's-bench.

THERE appears nothing new reſpecting the court *coram rege ubicunque*, &c. commonly called the king's-bench, unleſs the frequent mention of the *marſhal*, as the officer and gaoler, may be conſidered as ſuch. We find the marſhals of the king's-bench ſpoken of very familiarly at the beginning of this reign; eſpecially in ſtat. 5 Ed. III. c. 8. relating to the bailing of felons: as this ſtates ſome things very particularly, it may be well to give it at length. It begins by complaining, that perſons indicted of felonies, robberies, and thefts, uſed to remove the indictment before the king, and there ſurrender themſelves; upon which they would be let to bail by the marſhals of the king's-bench, as were alſo perſons appealed, againſt whom an exigent had been awarded. As this was letting offenders looſe upon the country, it was neceſſary ſome reſtraint ſhould be put on the marſhal's power of bailing: it was therefore enacted, that ſuch perſons ſhould be kept in priſon; and if any marſhal was complained of within term for doing otherwiſe, that the juſtices ſhould do what was right. At the end of every term the marſhals were to chuſe before the juſtices, before they departed from the place (ſuppoſing,

(*a*) Cott. Abrid. 25 Ed. III. 34. (*b*) Cott. Abrid. 50 Ed. III. 82. (*c*) Ibid. 153.
(*d*) Ibid. 31. (*e*) Ibid. 38.

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as was ſometimes the fact, that the king's-bench ſat in many different parts of the kingdom in different terms), in what town they would keep their priſoners; and there they were to hire houſes at their own coſts for keeping of ſuch priſoners, and were not to ſuffer them to go wandering abroad neither with bail nor without; and if any were found wandering, the marſhal was to be impriſoned for half a year, and ranſomed at the king's will. After the ſtatute had made this proviſion for the marſhals of the king's-bench, who it ſhould ſeem were deputies intruſted on occaſion of removals of that court, it enacts, reſpecting *the marſhal*, that it ſhould be done within the *verge*, as reaſon ſhould require. A diſtinction, and at the ſame time a ſort of connexion, is here marked between the marſhal of the verge and the marſhals of the king's-bench, which ſeems to juſtify a conjecture that this officer was adopted from the court of the ſteward and the marſhal. In the 22d year of the king, the commons wanted to carry this law againſt the marſhals ſtill further; for they prayed, that if they let any body at large who was committed for the peace, they might anſwer in damages; but this was denied (*a*).

When *Magna Charta* declared that common pleas ſhould be held in a certain place, it ſeems to have been underſtood as of a certain *court* for ſuch pleas, and not of a *certainty* of *place* where that court ſhould be held; for we find the common bench had been removed like the king's-bench, tho' perhaps not ſo frequently, as it did not in its ſtile import to be attendant on the perſon of the king. To prevent the expence and miſchief which happened to ſuitors by ſuch removals, it was ordained by ſtat. 2 Ed. III. c. 11. that before ſuch removal the juſtices ſhould be warned thereof, in order that they might duly adjourn the parties, and ſo prevent their loſing their proceſs.

The court of exchequer underwent ſome parliamentary regulations. The exchequer was a depoſitory of records; and therefore by ſtat. 9 Ed. III. ſt. 1. c. 5. it was ordained, that juſtices of aſſiſe, gaol-delivery, and of *oyer and terminer*, ſhould ſend all their records and proceſſes determined and put in execution to the exchequer at Michaelmas every year; and that the treaſurer and chamberlains ſhould receive them under the ſeals of the juſtices, and keep them in the treaſury, as had been uſual heretofore: the juſtices, before making out the eſtreats, were to ſend to the exchequer as formerly.

Error in the exchequer.

The courſe of appeal from judgments in the exchequer was, after ſeveral petitions to parliament, at length ſettled by ſtatute. In the 21ſt year of the king, the commons petitioned that judgments given in that court might

(*a*) Cott. Abrid. 22 Ed. III. 20.

be

be redreſſed and reverſed, if erroneous, in the king's-bench, the ſame as error in the common-pleas, and not before themſelves, who gave the judgment, as it ſhould ſeem the courſe then was. To this it was anſwered, that ſuch error ſhould be amended by the chancellor, treaſurer, and two juſtices (*a*). But it was afterwards ſomewhat differently declared, by ſtat. 31 Ed. III. ſt. 1. c. 12. which enacts, that where a man complained of error made in proceſs in the exchequer, the chancellor and treaſurer ſhould cauſe to come before them in any chamber of council (*b*) nigh the exchequer, the record of the proceſs out of the exchequer, taking to them the juſtices, and ſuch other ſage perſons as ſhould ſeem proper; and ſhould cauſe to be called before them the barons of the exchequer, to hear their informations and the cauſes of their judgment, and thereupon duly examine the buſineſs; and if any error was found, ſhould correct and amend the roll, and afterwards ſend them into the exchequer for execution to be done thereof.

THESE are all the proviſions which were made by parliament for the better ordering of buſineſs in the court of exchequer. But the commons had frequently petitioned for other alterations in the practice of this court, which, tho' they were unſucceſsful in obtaining, may be worthy of notice, as they exhibit ſomething of the uſage of the court, and the opinion then entertained about it. In the 22d year the commons prayed, that an accomptant in the exchequer might not be run to iſſues before he had been warned to appear. To this it was anſwered, that the proceſs ſhould be firſt a *venire facias*, and then a *diſtringas* (*c*). Towards the cloſe of the reign they prayed, that a man might have the privilege of waging his law in the exchequer, as in other courts; but this being excluded in that court by the king's prerogative, who was plaintiff, or intereſted in all ſuits there, was not granted (*d*). In like manner, when it was prayed that attaints might be had of verdicts in the exchequer, as in other courts, it was refuſed (*e*).

WE find it had become a practice to ſue in the exchequer upon *ſuggeſtions*, in the way which had been ſo often complained of before, reſpecting the council. The whole proceeding by ſuggeſtion being a prerogative courſe, might, upon that idea, have got footing in the exchequer, which was a court for ordering and governing the king's revenue, and therefore, of all others, beſt intitled to the like extraordinary and ſummary way that was affected by the council. In the 40th year of this king we find a caſe which ſomewhat ex-

(*a*) Cott. Abrid. 21 Ed. III. 26. (*b*) *En auſcune chambre du conſeile.* (*c*) Cott. Abrid. 22 Ed. III. 17. (*d*) Cott. Abrid. 50 Ed. III. 83. (*e*) Ibid. 29 Ed. III. 27.

plains

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plains what this courſe was. It was ſaid by *Lud*, a baron in the exchequer, that tho' no proceſs was made againſt the king's debtor, yet if he was found preſent in the exchequer before us, he ſhall be bound to anſwer to the king. To this another, named *Fitz-John*, ſaid, that ſo it would be, provided it appeared of record that he really was a debtor; but not, if it only appeared by *ſurmiſe or ſuggeſtion made*, for *then* he ought to be brought in by proceſs, &c. (*a*) This was putting it upon the footing of the other courts; and accordingly, in the 47th year, the commons prayed that ſome remedy ſhould be had where perſons were called into the exchequer upon ſuggeſtion *without* proceſs, contrary to the ſtatute made in the 42d year of the king (*b*) before mentioned. The anſwer to this was, that if any ſpecial complaint was made, remedy might be had (*c*); ſo that theſe ſuggeſtions in the exchequer (which were in fact no other than petitions, or *bills*, as ſince called) were left upon the ground of ſtat. 42 Ed. III.

Juſtices of aſſiſe and niſi prius, &c.

EQUAL pains were taken to improve other parts of our judicial eſtabliſhment: the commiſſions of aſſiſe and *niſi prius*, of *oyer and terminer* and of gaol-delivery, received ſeveral modifications. It was complained that felonies had been very much encouraged, not only by too eaſy pardons, but alſo thro' an inattention to a ſtatute made in the time of Edward I. (*d*) which directed, that the juſtices aſſigned to take aſſiſes, if laymen, ſhould make deliverance of the gaol; and if the one was a clerk, and the other a layman, then the lay-judge, together with another of the country aſſociated with him, ſhould deliver the gaol. It was therefore enacted, by ſtat. 2 Ed. III. c. 2. that juſtices ſhould be appointed, as directed by that act; and that aſſiſes, attaints, and certificates, ſhould be taken before the juſtices commonly aſſigned, being good men and lawful, and having knowledge of the law, as directed by another ſtatute of Edward I. In addition to this it was now further provided, that writs of *oyer and terminer* ſhould not be granted but before juſtices of the one bench or the other, or the juſtices errant; and that only *for great hurt and horrible treſpaſs*, and of the king's ſpecial grace, as ordained almoſt in the ſame words by the ſtatute of Weſtm. 2d. (*e*)

THE next proviſion relates to the commiſſion of *niſi prius*. The laſt alteration made in this commiſſion was by the ſtatute of *York*, in the laſt reign (*f*), which confines it to caſes "*if the* DEMANDANT *pray the ſame.*" It was now enacted, by ch. 16. of the ſame ſtatute, that all ſuch inqueſts to be taken in a

(*a*) 40 Aſſ. 35 pl. (*b*) Vid. ant. 90. (*c*) Cott. Abrid. 47 Ed. III. 34. (*d*) Stat. 27 Ed. I. ſt. 1. c. 3. Part I. 416. (*e*) Ch. 29. Part I. 413. (*f*) Vid. ant.

plea

plea of land, ſhould be taken as well at the ſuit of the tenant as of the demandant, with a ſaving of all other proceſs, as appointed by the ſaid ſtatute of York. By ſtat. 4 Ed. III. c. 2. it was ordained, reſpecting three of theſe commiſſions, that good and diſcreet perſons, other than of the places, if they could be found ſufficient, ſhould be aſſigned in all the counties in England to take aſſiſes, juries, and certifications, and to deliver gaols; and that, three times a year, and more often, if need were.

THE commiſſion of *niſi prius* was further materially altered by two ſtatutes, which at length put it on the foot it has continued on ever ſince; that is, by ſtat. 14 Ed. III. c. 16. and 20 Ed. III. c. 6. We have ſeen, that by the original eſtabliſhment of theſe juſtices (*a*), inqueſts and juries upon iſſues ariſing in the court of king's-bench or common-pleas, were to be taken before one or more juſtices of the ſame place; but it often happened, that in many counties no juſtice of that deſcription came, which brought great inconvenience on ſuitors and on the jurors impannelled. To remedy this it was ordained, by ſtat. 14 Ed. III. c. 16. that, in the king's-bench, a *niſi prius* ſhould be granted before any juſtice of the court, if any of them went into that part; if not, then before any juſtice of the common-pleas, at a certain day to be agreed; and a tenor of the record was to be delivered or ſent to him, under the ſeal of the chief juſtice of the place; at which day he was to take the inqueſt, and return the verdict under his ſeal, with the writ, the tenor, and the pannel, which ſhould be received in the king's-bench and enrolled, and thereupon judgment given according to the verdict. The ſaid juſtice of the common-pleas was to have power to record defaults and nonſuits, the ſame as if the *niſi prius* had been granted before ſome juſtice of the king's-bench; after which defaults ſo recorded and returned, the juſtices were to give judgment upon the record. Thus far reſpecting iſſues depending in the king's-bench: the ſame courſe was to be purſued in regard to iſſues in the common-pleas. Further, it was provided, that ſhould no juſtices of either bench come into the country where inqueſts or juries were to be taken, then the *niſi prius* was to be granted before the chief baron of the exchequer, *if he be a man of the law* (which, it ſeems, at this time he ſometimes was not), with the ſame powers as the juſtices of the one bench or the other; and if neither any juſtice nor the chief baron came into the country, then the *niſi prius* was to be granted before the juſtices aſſigned to take aſſiſes in thoſe parts, ſo that one of the juſtices aſſigned was a juſtice of the one bench or the other,

(*a*) 13 Ed. I. ſt. 1. c. 30. 12 Ed. II. ſt. 1. c. 3, 4. Part I. 414.

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or the king's ſerjeant ſworn, with the ſame authority as was given above to the juſtices of the one bench or the other. It was alſo directed, that, ſhould one party demand the tenor of the record, to deliver to the juſtices before whom the *niſi prius* was granted, in order to prevent any fraud or damage being done to the other party, or the inqueſt, another tenor of the record ſhould be given to the other party, if he required it. As the juſtices of *niſi prius* were authorized by the ſtatute of York to give judgment in the country upon verdicts of aſſiſe and of inqueſts, and upon nonſuits and defaults, it was ordained, that the juſtices appointed by this act ſhould have the ſame authority.

In the 20th year of this *(e)* king, it was ordained, that juſtices of aſſiſe ſhould have commiſſions authorizing them to enquire in their ſeſſions of ſheriffs, eſcheators, bailiffs of franchiſes, and their under-miniſters; and alſo of maintainers, common embraceors, and jurors in the country, if the ſaid officers took any thing for the execution of their office, as for making pannels, or putting in jurors ſuſpected and of evil fame; and if the ſaid maintainers, embraceors, or jurors took reward of the parties to prevent the courſe of juſtice. This proceeding was to be as well at the ſuit of the king as that of the parties; and therefore, ſays the ſtatute, the king has commanded the chancellor and treaſurer to hear the complaints of all perſons, and to ordain ſpeedy remedy.

The other material alteration in the proceeding by *niſi prius*, was effected by ſtat. 42 Ed. III. c. 11. It was complained that the pannels of inqueſts were not returned before the ſeſſions of the juſtices at *niſi prius*, and otherwiſe; ſo that the parties could not have knowledge of the names of the perſons to paſs on the inqueſt, whereby, ſays the ſtatute, divers of the people have been diſinherited and oppreſſed. To remedy this it was now enacted, that no inqueſts, but aſſiſes and deliverances of gaols, ſhould be taken by writ of *niſi prius*, nor in other manner, at the ſuit of any one, before the names of all them that were to paſs in the inqueſt were returned into court. Thus far of *niſi prius*. As to aſſiſes, it was directed, that ſheriffs ſhould array the pannels in aſſiſes, four days at leaſt before the ſeſſions of the juſtices, under the penalty of 20l. ſo that the parties might have a view of the pannel, if they required it. It was further directed, in order to facilitate the above regulation, that bailiffs of franchiſes ſhould, under the like pain, make their return to the ſheriff ſix days before the ſeſſions.

(*a*) Ch. 6.

THESE two acts of the 14 and 42 Ed. III. deſerve a particular notice. It is probable, that before the 14 Ed. III. there uſed to be no record made out for the trial at *niſi prius*; which being before a juſtice of the court where the iſſue was joined, there was leſs need of any copy of it to inform the judge; and the authority to try the iſſue reſted wholly on the judge's commiſſion of *niſi prius*. Whether before this act there might not be ſometimes ſuch a copy made, can only be collected from probable conjecture; but ſince this act, it became both expedient and requiſite that a tenor of the record ſhould be made, which has ſince been called the *Niſi Prius* Record: upon which the judge "returned the verdict," as the act ſays, making what has been ſince called the *Poſtea*, from the initial word of ſuch formal return.

THE alteration effected by ſtat. 42 Ed. III. was this. We have ſeen that heretofore certain writs uſed to be made returnable before the juſtices itinerant, ſometimes with a clauſe of *niſi prius*, ſometimes without (*a*). It is probable this practice was not yet wholly out of uſe, and that this ſtatute alludes to it, when it ſpeaks of "writs returned at the ſeſſions of the juſtices at *niſi prius* "*and otherwiſe*." We have alſo ſeen (*b*) that this clauſe of *niſi prius* was inſerted not only in the writ of *venire facias*, as directed by the ſtatute of *niſi prius*, but alſo in the writs of *habeas corpora juratorum* and *diſtringas*, when the jurors were brought in by either of thoſe writs, after their default on the *venire facias*. The practice had continued, as formerly, irregular and unſettled; but when this act directed that no inqueſt ſhould be taken by "*niſi prius*, or other manner," before the names of the jurors were returned into court, it is probable that, in order to attain this object, the jury-proceſs begun then firſt to be arranged in this way: The *venire facias*, inſtead of containing the clauſe of *niſi prius*, was made returnable at ſome day in term, with the pannel annexed; and then, when the parties had had the opportunity of making their challenges, as deſigned by the ſtatute, the proceſs of *diſtringas* or *habeas corpora* would iſſue, with a clauſe of *niſi prius* in it, returnable the following term; and upon this writ the trial was had. Thus, ever after, it was neceſſary in all cauſes that went to trial, to have both a *venire* and a proceſs of contempt, either a *diſtringas*, or a *habeas corpora* againſt the jurors.

SOME few regulations were made reſpecting juſtices of *oyer and terminer*, independent of the other commiſſions, and which, for this reaſon, we have reſerved to be mentioned laſt. In the ſtatute of Northampton, ſtat. 2 Ed. III. c. 6. which contains many proviſions for the better keeping of the peace and puniſhment of offenders, it was ordained by chap. 6. that whereas by

(*a*) Part I. 415. (*b*) Ibid.

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the ſtatute of Wincheſter the juſtices aſſigned had power to enquire of defaults of that ſtatute, and make a report thereof to the king in parliament, to be remedied by the king. This courſe not ſeeming effectual, it was now enacted, that the ſaid juſtices ſhould have power to puniſh all diſobedient perſons. This was in the early part of the reign, before the keepers, and, as they were afterwards called, juſtices of the peace were commiſſioned with ſuch high powers as they afterwards received.

By chap. 7. of the ſame ſtatute there is a ſpecial authority given to juſtices of *oyer and terminer*, which ſeems to be a confirmation of the court of *trailbaſton* inſtituted by Edward I. For the puniſhment of felonies, robberies, manſlaughters, treſpaſſes, and oppreſſions of the people, it was enacted, that the king ſhould aſſign juſtices in divers places, within the king's-bench and elſewhere, as was done in the time of Edward I. of great men of the land, being of great power, with ſome juſtices of one bench or the other, with other learned men in the law, to inquire, as well at the ſuit of the party as at the king's ſuit, and *to hear and determine* all manner of felonies, robberies, manſlaughters, theft, oppreſſions, conſpiracies, and grievances done to the people againſt the law, ſtatutes, and cuſtoms of the realm, as well within franchiſes as without; and alſo to enquire of ſheriffs, coroners, under-ſheriffs, hundredors, bailiffs, conſtables, and all other miniſters, within liberties and without. We ſhall ſee afterwards, that the authority of juſtices of the peace was thought more conducive to this end than this commiſſion of *trailbaſton*, and that it was gradually ſuperſeded thereby. In the 34th year of this king (*a*) it was ordained, that the juſtices aſſigned in writs of *oyer and terminer* ſhould be named by the court, and not by the party, as we have ſeen might be, and was uſually the courſe.

Thus ſtood the commiſſions of aſſiſe and *niſi prius*, of *oyer and terminer* and gaol-delivery, at the cloſe of this reign. Tho' attempts had been made to expedite cauſes when they had come to that ſtage in which a *niſi prius* ſhould iſſue, it was prayed by the commons, in the 50th year of the king, that the proceſs of ſuch as were at iſſue, and did not within one year after ſue out their *niſi prius*, ſhould be diſcontinued, and held void. And again, if the plaintiff or defendant did not, upon the return of the *habeas corpora*, ſue out his *niſi prius*, that the whole proceſs might be diſcontinued; and further, that every man might have his *niſi prius* granted, as well againſt the king as others, without ſuing to the privy-ſeal: but neither of theſe ſucceeded (*c*); any

(*a*) Ch. 1. (*c*) Cott. Abrid. 50 Ed. III. 146. 174.

more

more than a petition that ſuch as ſued forth aſſiſes ſhould not be obliged to pay for the juſtices patent, as had always been the uſage (*a*).

THERE was a ſtatute made in the 20th year of the king, which had a reference to all the courts we have been mentioning, and was founded in a zeal for the due adminiſtration of juſtice to all the king's ſubjects. This ſtatute opens by ſtating, that the king *had* commanded his juſtices to do equal law and execution of right to all his ſubjects, whether rich or poor, without any regard to perſons, or delaying to do right on account of any letters or commandment from the king, or any other; and it enacts, that ſhould any letters, writs, or commandments, come to the juſtices, or to others deputed to do law and right, according to the uſage of the realm, in diſturbance of the law, or execution thereof; the juſtices, and others deputed, ſhould proceed to hold their courts and proceſſes, where pleas and matters were depending, as if no ſuch interference had been made. It recites, that the king had cauſed all his juſtices to be ſworn, to take no fee nor robe (that being the denomination under which part of their ſalary was paid) of any one, but the king only, during their office; and to take no gift nor reward, by themſelves or by others to their uſe, of any one who had any matter depending before them, except meat and drink, and that of ſmall value; and further, to give no counſel to any, where the king was party, or was intereſted, under pain of their body, lands, and goods; and at the ſame time the judges' fees were increaſed (*b*). The ſame was ordained of the barons of the exchequer; and they were expreſsly commanded, in the king's preſence, to do right and reaſon to all the king's ſubjects, without the delays that had been ſo much complained of in that court (*c*). It was alſo ordained, that juſtices aſſigned to hear and determine, and thoſe who were aſſociated to them, juſtices of aſſiſe to be taken in the country, and of gaol delivery, and thoſe aſſociated to them, ſhould take ſuch an oath as ſhould be enjoined them by the council in the chancery, before their commiſſions were delivered to them (*d*).

THE impediment thrown in the way of judicial proceedings by protections, was a great grievance to the nation; and notwithſtanding the fair appearance of the king's intention, as expreſſed in the above ſtatute, theſe protections were granted all thro' this and the ſubſequent reigns, and the commons frequently, though in vain, petitioned againſt them. In ſtat. 25 Ed. III. ſt. 5. c. 19. we find the king had granted protections to ſeveral

(*a*) Cott. Abri. 45 Ed. III. 35. (*b*) Ch. 1. (*c*) Ch. 2. (*d*) Ch. 3.

 perſons,

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perſons, being his debtors, diſcharging them from any other actions of debt till they had ſatisfied the king. However, it was provided by that act, that ſuch perſons ſhould anſwer ſuits againſt them, and only execution of the judgment ſhould be ſuſpended till the king was paid; tho' ſuch plaintiffs, if they would undertake for the king's debt, might have execution againſt the defendant. Very early in this reign it was enacted (*a*), that it ſhould not be commanded by the great or little ſeal to diſturb or delay common right; and if any ſuch command was to come, the juſtices were to diſregard it. As there was ſtill complaint of fines being exacted for *beaupleader*, the ſtatute of Marlbridge was directed to be obſerved (*b*).

AFTER the ſeveral courts, the remedies of the law conſtitute the next objects of conſideration. Nothing more was done by the parliament on this head than enlarging and modifying thoſe already in uſe, making no addition to the old ſtock.

Attaints.

THE writ of attaint was the only redreſs to which thoſe could reſort who had ſuffered by an unjuſt verdict; and this was rendered more general and more expeditious by ſome few regulations. It was ordained by ſtat. 1 Ed. III. ſt. 1. c. 6. that a writ of attaint ſhould be granted, as well upon the *principal* as the damages in a writ of attaint, and that the chancellor ſhould have power to grant ſuch writs without ſpeaking thereof to the king. And further it was enacted, that the juſtices ſhould not omit taking the attaint becauſe the damages for which it went were not yet paid; which it ſeems was before held a good objection upon the trial, as the party plaintiff could not ſay he had been damnified till he had paid the damages given by the former verdict. To avoid the great delays to which attaints as well as other ſuits were liable, but which were particularly grievous in an action that was occaſioned by miſconduct of jurors, who had failed of doing their duty, it was enacted, by ſtat. 5 Ed. III. c. 6. that no eſſoin of the king's ſervice nor protection ſhould be allowed in ſuch juries, any more than in aſſiſes of novel diſſeiſin; that five days in the year at leaſt ſhould be given before the juſtices of the common bench in ſuch juries; and that there ſhould be a *niſi prius* in this, as in other writs. Again: by the next chapter of the ſame act the proviſion of ſtat. 1 Ed. III. concerning attaints in treſpaſs, was enlarged; for it was enacted, that attaints ſhould be allowed as well in pleas of treſpaſs moved *without* writ as by writ, before juſtices of record, if the damages adjudged were more than forty ſhillings;

(*a*) Stat. 2 Ed. III. c. 8. (*b*) Stat. 1 Ed. III. ſt. 2. c. 8.

and

and ſtill further by ſtat. 28 Ed. III. c. 8. which gives this writ as well upon *a bill* (which had lately become a common way of inſtituting ſuits) as a writ of treſpaſs, without any regard to the quantity of damages (*a*).

In the mean time the parliament had been ſolicited to make this remedy more general. In the 21ſt year there was a petition praying, that attaints ſhould be granted in writs of debt, and all other writs and bills where the demands or damages did not amount to forty ſhillings; and further, in actions where a perſon ſued *tam pro domino rege, quam pro ſeipſo*, as the king's miniſters and others frequently did, where, as the whole principal and damages recovered went to themſelves and not to the king, it was thought hard that neither a writ of error or attaint ſhould be had. But though it was granted that writs of error ſhould lie, this, as well as the former application about attaints, did not receive a favourable anſwer (*b*). However, the parliament at length complied with the wiſhes of the people, and it was ordained by ſtat. 34 Ed. III. c. 7. that an attaint ſhould be had by the perſon againſt whom a verdict ſhould paſs, as well in pleas *real* as pleas *perſonal*; and that it ſhould be granted to the poor, who would *affie* that they had nothing whereof to make fine, ſaving their countenance, without paying any, and to all others upon eaſy, fine. After this the proceeding by attaint grew more common, being open to all perſons that were aggrieved by a falſe verdict.

It was complained, that executors could not by the old law have an action for a treſpaſs done to their teſtator, as of goods and chattels carried away; to remedy which it was enacted by ſtat. 4 Ed. III. c. 7. that they ſhould have actions in ſuch caſes, and recover damages as their teſtators might. And further by ſtat. 25 Ed. III. ſt. 5. c. 5. it was ordained, that executors of executors ſhould have actions of debt, accompt, and of goods carried away of the firſt teſtator; and further, ſhould have execution of ſtatutes-merchant, and recognizances made in courts of record of the firſt teſtator, as he ſhould have had if alive: and ſuch executors of executors were to anſwer to others for as much of the goods of the firſt teſtator as came to their hands, in the ſame manner as the firſt executors ſhould have done if alive.

We have before ſeen, that an *aſſiſa utrum*, or, as it had now long been called, a *juris utrum*, would not lie for any but a parſon (*c*); but it was now ordained by ſtat. 14 Ed. III. ſt. 1. c. 17. that parſons, *vicars*, wardens of chapels, and provoſts, wardens and prieſts of perpetual chauntries, ſhould

(*a*) Part I. 379. (*b*) Cott. Abri. 21 Ed. III. 23, 24. (*c*) Part I. 269.

have

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have writs of *juris utrum* of lands and tenements, rents and poſſeſſions annexed to vicarages, chapels, and chauntries, and recover by other writs in their caſe, as parſons of churches or prebends. The writ of *deceit* was extended by ſtat. 2 Ed. III. c. 17. which enacted, that it ſhould be maintainable as well in caſe of garniſhment touching plea of land, where ſuch garniſhment was given, as in caſe of ſummons in a plea of land.

THESE were the alterations made in ſome old writs by parliament. The commons endeavoured to obtain a change of the law in two real writs, but were not ſucceſsful. They complained, that where land was given to a man and his wife, and the heirs of their body begotten, tho' they had no iſſue between them; yet if one died, the other, as the law then ſtood, might commit waſte, not being within any of the laws of Edward I. made againſt waſte *(a)*. This was thought a great hardſhip on the reverſioner, as the eſtate of the firſt takers (though ſuch a ſurvivor was called tenant in tail, after poſſibility of iſſue extinct) could be conſidered as only in effect an eſtate for term of life; it was therefore prayed, that a writ of waſte might lie in ſuch caſe. Again, as a writ of poſſeſſion would not by the old law lie of land deviſable *(b)*, altho' not actually deviſed, and this was felt to be a conſiderable impediment to juſtice, it was prayed that writs might be granted of ſuch lands, ſaving to the tenants their plea in caſe of an actual deviſe. The anſwer to both theſe petitions ſeems to intimate that they ſhould be ordained by ſtatute *(c)*; but no ſuch ſtatute appears to have been made.

BEFORE we go on to the alterations made in the proceſs and proceedings, it will be proper to mention a ſtatute which revived, in a particular inſtance, a piece of old law that had been repealed by a ſtatute of Edward I. *(d)* It was found, that Lombard merchants, with which the kingdom at this time abounded, would ſometimes eſcape out of the country without ſatisfying their creditors: in order to intereſt all the community in preventing ſuch frauds, it was enacted by ſtat. 25 Ed. III. ſt. 5. c. 23. that if any merchant of the company of Lombards acknowledged himſelf bound in a debt, the company ſhould anſwer for it; provided, however, that a merchant *not* of the company ſhould not be liable.

THE firſt ſtatute of this king that related to proceſs and proceeding, is ſtat. 2 Ed. III. c. 13. which is principally worthy of obſervation, becauſe

(a) Part I. 399. *(b)* Part I. *(c)* Parl. Rot. 21 Ed. III. 46, 47. *(d)* Part I. 376.

it

it ſhews the opinion to have then been, that the death of the king ſomewhat affected, if not deſtroyed, an action that was grounded on a treſpaſs; for this act declares, that like proceſs ſhould be made of treſpaſs done in the time of Edward II. as of treſpaſs done in the time of this king.

Proceſs of outlawry.

SEVERAL rules were laid down by ſtat. 5 Ed. III. c. 12 & 13. for caſes of outlawry in civil actions. It was enacted, that where the plaintiff ſhould recover damages, and the defendant was outlawed at the king's ſuit, no charter of pardon of his outlawry ſhould be granted, except the chancellor was certified that the plaintiff was ſatisfied for his damages. And where a man was outlawed by proceſs before his appearance, no ſuch charter was to be granted, except the chancellor was certified that the perſon outlawed had yielded himſelf to priſon before the juſtices of the place from whence the writ of exigent iſſued; as before the king's-bench, common-pleas, and juſtices of oyer and terminer; and if the latter were not ſitting, then to the king's-bench; and in ſuch caſe the record alſo with the proceſs was to be removed before that court. Upon the party ſurrendering, the juſtices were to warn the plaintiff to appear at a certain day; at which day, if the warning was duly witneſſed, and the plaintiff appeared, then they were to plead upon the firſt original writ, as tho' no outlawry had been pronounced: and if the plaintiff did not appear, the defendant was to be delivered according to his charter (*a*). Again, becauſe perſons duly outlawed had avoided their outlawry by reaſon of impriſonment, which had been ſupported by the falſe teſtimony of ſheriffs and others, it was enacted, that if any would defeat an outlawry by ſuch teſtimony, he ſhould ſurrender himſelf to priſon, and then the juſtices of the king's-bench ſhould cauſe the party at whoſe ſuit the outlawry was pronounced, to be warned to appear before them at a certain day; at which day, if he would verify that the teſtimony was untrue, ſuch verification ſhould be received. In like manner the king's ſerjeant, or his attorney, or other that would ſue for the king, was to be received to have the ſame averment againſt ſuch teſtimony, where the outlawry was pronounced at the king's ſuit (*b*).

IT may be juſt mentioned here, tho' it more properly belongs to the Part that treats of the criminal law, that a declaration was made by ſtat. 18 Ed. III. ſt. 2. c. 5. in what caſes an exigent ſhould iſſue; ſome ſmall alteration in which was made by ſtat. 2. of the ſame year, c. 5. both which will be ſpoken on more particularly in their proper place. We come next

(*a*) Ch. 12. (*b*) Ch. 13.

to

to ſtat. 25 Ed. III. ſt. 5. c. 7. which gave a greater ſcope to the proceſs of outlawry in civil actions; for it enacts, that ſuch proceſs ſhould be made in a writ of *debt*, and *detinue* of chattels, and in taking of beaſts (*a*), that is, replevin, by writ of *capias* and proceſs of exigent, as was uſed in a writ of accompt. Before this the writ of accompt, as has been before ſeen, was the only action properly civil (for the action of treſpaſs was not) in which proceſs of outlawry lay.

Execution of writs.

For the due execution of theſe and all writs in general, ſome alteration was made in the ſtat. 2 Weſtm. c. 39. For whereas that directs writs to be delivered to the ſheriff in the *full* or *rear county*, and that in ſuch caſe the ſheriff ſhould thereupon make a bill; it was now enacted by ſtat. 2 Ed. III. c. 5. that at whatſoever time or place in the county a man delivered a writ to the ſheriff, or under-ſheriff, they ſhould receive the ſame, and make a bill according to the above ſtatute, without taking any thing for ſo doing; and if they refuſed, others who were preſent might ſet their ſeals to it; and the ſheriff or under-ſheriff ſhould be liable to the penalties of the above ſtatute if they failed in returning the writ; and power was given to the juſtices of aſſiſe to hear all complaints on this ſubject, and award damages to the aggrieved party. It had been enacted by ſtat. 1 Ed. III. ſt. 1. c. 5. that a man might aver againſt the falſe returns of bailiffs of franchiſes, who had full returns of writs, and recover as well againſt them as againſt the ſheriff, where too ſmall iſſues were returned, and in other caſes, ſo that it was not to the prejudice of the lords and their franchiſe, or that of holy church, and that the puniſhment fell wholly on the bailiffs. So many expedients were tried to ſecure the regular execution of proceſs.

Some of the rigorous conſequences of the antient proceſs were removed. By ſtat. 9 Ed. III. c. 2. the old law of *non plevin* was taken away (*b*); for it was enacted, that none ſhould loſe his land by reaſon of *non plevin*. By chap. 3. of the ſame act the *fourcher* by eſſoin was taken from executors, as it had been from other co-defendants by ſome ſtatutes of Edward I. (*c*). It was ordained, that in a writ of debt brought againſt divers executors, neither they, nor any of them, ſhould have more than one eſſoin before appearance, that is, at the ſummons or attachment; and after appearance but one, as the teſtator ſhould have had: ſo that the executors were to be conſidered only as one man repreſenting the teſtator. And further, by the ſame act, a courſe of proceſs againſt executors was thus directed; namely, that, tho' the

(*a*) *en priſes des avers.* (*b*) Part I. 96. (*c*) Part I.

ſheriff

ſheriff anſwered at the ſummons, that ſome of them had nothing whereby he might be ſummoned, yet an attachment ſhould ſtill be awarded againſt them. And if the ſheriff anſwered, that he had nothing whereby he might be attached, the great diſtreſs ſhould be awarded; ſo that at the return thereof, he or they who firſt appeared in court ſhould anſwer to the plaintiff: and though ſome of them had appeared in court, and made default at the day the great diſtreſs was returned upon the other, yet ſtill he or they who firſt appeared at the great diſtreſs ſhould be put to anſwer; and in caſe the judgment paſſed for the plaintiff, he ſhould have his judgment and execution againſt thoſe who pleaded, *and* againſt all others named in the writ, of the goods of the teſtator, as well as if they had all pleaded. However, the ſtatute contains a ſaving for thoſe who choſe to proceed upon the old common-law proceſs.

As the law now ſtood, a demandant in a plea of land was often delayed, by tenants vouching to warranty dead men, againſt which voucher the demandant was not received to aver that he was dead; but it was now enacted by ſtat. 14 Ed. III. ſt. 1. c. 18. that ſuch averments ſhould be received. Again, as by the old law (*a*) a queſtion upon a *falſe judgment* from an inferior court was to have been tried by duel, it was enacted by ſtat. 1 Ed. III. ſt. 1. c. 4. to correct ſo barbarous a proceeding, that when a record came into the king's court by writ of falſe judgment, if the party ſuggeſted that the record was otherwiſe than the court alledged it to be, the averment ſhould be received *of the good country* (*b*), *and of thoſe who were preſent at the court when the record was made*, if they were returned by the ſheriff with the others of the country; and if they came not, the inqueſt was to be taken by the good country.

Two other laws were made reſpecting trials; the one for the trial of deeds, the other of baſtardy. It was complained, that great delay happened in actions, by the parties pleading in bar a releaſe, quit-claim, or other ſpecial deed made within a franchiſe, where the king's writ did not run. To remedy this obſtruction to juſtice, it was enacted by ſtat. 9 Ed. III. ſt. 1. c. 4. that when ſuch deeds were exhibited in bar of an action, bearing date in a place within a franchiſe, although there were witneſſes of the ſame franchiſe, named in the deed; yet, if the deed was denied, proceſs ſhould be awarded into the county where the plea was moved, to have the inqueſt of the country *and* the witneſſes to appear: and if the witneſſes came not

(*a*) Part I.

(*b*) *Soit receu averrement de bone pais.*

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at the great diſtreſs, the juſtices were not on that account to omit proceeding to take the inqueſt, but go on in like manner as if the deed had been made in the county; a courſe ſimilar to one directed in a ſimilar caſe in this reign *(a)*. In ſtat. 25 Ed. III. ſt. 2. which communicated to children born of Engliſh ſubjects in foreign parts the privileges of natural-born ſubjects, it was ordained, that in queſtions of baſtardy, ariſing upon that act, the matter ſhould be certified by the biſhop of the place where the demand was, the ſame as where baſtardy was alledged againſt perſons born in England.

SOME matters of pleading were altered by ſtat. 25 Ed. III. ſt. 5. c. 11. The exception of non-tenure of parcel was not to abate any writ, but only for that quantity concerning which the non-tenure was alledged. Again, by ch. 18. of the ſame ſtatute, it was ordained, that notwithſtanding adjournment made in the eyre by writ *de libertate probandâ*, purchaſed by villeins to delay their lords of their actions againſt ſuch villeins, the ſame lords ſhould be received to alledge the exception of villenage againſt their villeins in all writs, whether ſuch writs *de libertate probandâ* were purchaſed by deceit, or in other manner; and that the lords might ſeize the bodies of their villeins, as they might before the writ *de libertate probandâ* was purchaſed. But a more effectual check was given to pleas of villenage, (which were very common at this time) by ſtat. 37 Ed. III. c. 17. ordaining, that no writ ſhould be abated by the exception of villenage, if the demandant or plaintiff would aver that he who alledged the exception was free the day of the writ purchaſed.

Qualifications of jurors.

NOTHING could be of more importance than that trials by jury ſhould be conducted with impartiality, and exempt from all external influence; and conſidering the perſons who conſtituted this tribunal, it was found very difficult to keep it clear of imputation. Of what ſort the imperfections of this mode of trial were, will beſt appear by the ſtatutes made in this reign to correct them. By ſtat. 5 Ed. III. c. 10. it was ordained, that if any juror in aſſiſes, juries, or inqueſts, took of the one party or the other, and was thereof duly attainted, he ſhould not in future be put on aſſiſes, juries, or inqueſts, and beſides, ſhould be impriſoned and ranſomed at the king's will; which offence was to be enquired of by the juſtices before whom ſuch aſſiſes, juries, or inqueſts were had. Again, in the 34th year, (becauſe ſheriffs arrayed their pannels of people procured, to effect which they would take perſons living at any diſtance from the county, who had no knowledge of the fact upon which the inqueſt was to paſs) it was enacted, by ch. 4. of that ſtatute, that

(a) Vid. ant.

pannels

pannels ſhould be made of *the next people (a)*, who were not ſuſpected or procured; and if the ſheriff acted otherwiſe, he was to be puniſhed by the juſtice in proportion to the offence againſt the king, and the damage ſuſtained by the party. Again, by ch. 8. of the ſame ſtatute, either of the parties (or any ſtranger for the king) might have his plaint by bill againſt a juror who had taken any thing of him, or the other party, for the verdict; which bill was to be before the juſtices, before whom the jury were ſworn, and the juror was to be put to anſwer immediately; and if he pleaded to the country, inqueſt was to be taken immediately. If the juror was fined at the ſuit of any but one of the parties, the perſon was to have half the fine, and the parties to the ſuit to recover their damages by aſſeſſment of the inqueſt; the juror was beſides to ſuffer a year's impriſonment, which the ſtatute declares ſhould be redeemed by no fine: the party was alſo to be at liberty to ſue by writ before other juſtices. In addition to the proviſions of this act, it was further ordained, by ſtat. 38 Ed. III. ſt. 1. c. 12. that ſuch corrupt juror ſhould forfeit ten times as much as he had taken, one half to him that would ſue, the other to the king. All embraceors procuring ſuch inqueſts were to be puniſhed in the ſame manner; and if ſuch embraceor or juror had not ſufficient to pay the above penalty, he was to be impriſoned for a year. No juſtice or other miniſter was to enquire *ex officio* of ſuch offences, but only at the ſuit of the party, or ſome other.

SUCH guards was it thought neceſſary to put upon this trial, tho' ſo much a favourite with the nation. Beſides theſe ſtatutes, that are more properly confined to civil actions, there were ſome that made ſimilar proviſions reſpecting jurors in criminal matters, and in inqueſts before eſcheators, and others; all which will be conſidered in their proper places.

THE right of waging his law was ſecured to a defendant, in an inſtance where in the time of Edward I. he was by law entitled to it *(b)*. It is ſaid, in ſtat. 38 Ed. III. ſt. 1. c. 5. that many people were grieved and attached by their bodies in the city of London, at the ſuit of citizens, ſurmiſing that they were debtors, and could be proved ſo by their papers, tho' they had no deed or tally to produce: it was therefore enacted, that every man ſhould be received *to his law* by people ſufficient of his condition againſt ſuch papers, and the creditor ſhould not put the party to plead to the inqueſt unleſs he choſe; but, if he would wiſh to do ſo in future, he muſt take care to have ſome other ſecurity than mere papers: ſo that the wager of law againſt mere

Law wager.

(a) *De plus procheins gentz.* (b) Part I. 474.

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papers (and *à fortiori* againſt verbal teſtimony) was ſecured to the citizens of London, as firmly as it was before practiſed in the common-law courts.

As to the end and object of ſuits, both civil and criminal, it was ordained, by ſtat. 38 Ed. III. ſt. 1. c. 3. that all fines taken before juſtices ſhould be in the preſence of the pledges, and the pledges were to know the ſum of the fine before they departed.

Statute of jeofail.

We have before ſeen (*a*) how ſcrupulous and nice the old pleaders were in every point of the proceſs and proceeding in an action, ſo as to cavil at miſtakes in ſyllables and letters. As many of theſe miſtakes were owing to the negligence of clerks, and they were never in themſelves of ſuch importance as to deſerve all the attention that had been paid them, it was thought prudent to remove ſome of theſe frivolous objections by a parliamentary declaration. It was accordingly enacted, by ſtat. 14 Ed. III. ſt. 1. c. 6. that by the miſpriſion of a clerk, in any *place* (that is, *court*) whatſoever, by miſtaking in writing one ſyllable, or one letter, too much or too little, no proceſs ſhould be annulled or diſcontinued; but as ſoon as the thing was perceived, by challenge of the party or in other manner, it ſhould be haſtily amended in due form, without giving advantage to the party that challenged the ſame, on account of ſuch miſpriſion. This is the firſt of thoſe proviſions, which in latter times have been called *Statutes of* JEOFAILE *and Amendment*. Some farther regulation on this ſubject was made by ſtat. 36 Ed. III. ſt. 1. c. 15. which act is better known by the alteration it made in the language of courts, directing that all matters ſhould be there debated in Engliſh, and not in French as heretofore. The ſtatute ſets forth as a reaſon why the laws were ſo ill obeyed, becauſe "they were pleaded, ſhewed, and judged in the *French* "tongue, which was much *unknown in the realm*; ſo that the people (ſays "the act) which do implead, or be impleaded in the king's court, and in the "courts of other, have no knowledge nor underſtanding of that which is ſaid "for them, or againſt them, by their ſerjeants or other pleaders:" for the better obſervance, therefore, of the law, it was enacted, that pleas which ſhould be pleaded in all courts whatſoever, whether in the king's or other courts, before the king's juſtices or others, ſhould be pleaded, ſhewed, defended, anſwered, debated, and judged in the *Engliſh* tongue, and that they ſhould be entered and inrolled in *Latin*; which latter was no more than confirming the ancient practice; records of courts always having been in Latin.

Pleadings to be in Engliſh.

(*a*) Part I.

THUS

THUS the language which the Conqueror had impoſed upon our courts, perhaps, as the ſtrongeſt badge of ſervitude that could be deviſed, was ſuffered no longer to maintain its ground; ſince the victories of Edward having given the Engliſh a declared ſuperiority over their former maſters, ſeemed to mark this as a proper time for ſuch a revolution. Tho' the language of our courts in all argument and deciſion was henceforward to be Engliſh, the French ſtill continued the written language of the law, being that in which it had uſed to liſp in its infancy, and to which in its maturer years it was ſtill attached as a ſort of mother-tongue. Thus, many apt and ſignificant phraſes and words were ſtill retained in debate, and converſation upon topics of law; and the reports of what paſſed in court were ſtill taken and publiſhed in French for hundreds of years after. It was foreſeen and intended by the makers of this act, that much of the old language ſhould ſtill remain; for after the above change is ordained, there is added the following reſervations, namely, "that the laws and cuſtoms of the realm, *terms* and *proceſſes* be "holden and kept as before had been; and that, by the ancient *terms and* "*forms of counting (les aunciens termes formes de counter)* no man ſhould be pre-"judiced, ſo that the matter of the action be fully ſhewed in the declaration, "and in the writ;" which meant no more than that tho' ſuch eſtabliſhed and known forms of expreſſion were not in Engliſh, yet it ſhould be no breach of this ſtatute.

OUR criminal law received ſome improvement from ſtatutes paſſed in this reign. The reducing the crime of treaſon to a certainty by a parliamentary definition, as it freed the ſubject from the entanglement of ambiguous and unknown law, and, conſequently, from the arbitrary deciſions of judges, very eminently diſtinguiſhes this period in the hiſtory of our penal law. The offence of treaſon in its original notion, as a crime againſt the ſtate, lay open to a great latitude of conſtruction: not only direct breaches of allegiance to the ſupreme power, but violating the perſons who were nearly related to, or attendant on, the perſon of the ſupreme magiſtrate; diſorders of a public nature, tending to confuſion and civil commotion; bold and riotous breaches of the peace; affectations of extraordinary influence and authority, with ſpeeches of an ambitious import, have at divers times been brought within the bounds of this offence, as conducing in their conſequences to ſubvert the eſtabliſhed order of allegiance and ſubordination in government. This had been remarkable in the early times of our law; when it was left, in a great meaſure, to the breaſts of judges to fix and determine by their judgment, in particular caſes, what was treaſon, and what not.

Killing

Killing the king's father or brother, or even killing his meſſenger, had received the puniſhment of treaſon (*a*). In the preſent reign they had gone ſtill further. In the 21ſt year of the king, a knight of Hertfordſhire forcibly detained a man till he paid him 90l.: this was held treaſon, *becauſe* he was in ſo doing guilty of *accroaching* (as they called it), or attempting to exerciſe royal power.

PERHAPS one great motive to raiſing theſe conſtructive treaſons, was the forfeiture which in ſuch caſe belonged to the king: and the loſs thereby ſuſtained by lords who would be intitled to an eſcheat in caſe of felony, and who at any rate incurred a diminution of the caſualties of tenure by ſuch forfeiture, might be a ſpur to them to obtain ſome parliamentary redreſs. The whole kingdom were intereſted in a queſtion that touched the lives of all. The determination above-mentioned created ſuch an alarm, that we find a petition of the commons, ſtating, that certain juſtices had lately adjudged ſome matters before them to be treaſon and accroachment of royal power; they therefore prayed, that it might be declared in parliament *what is the accroachment of royal power*, which ſhould occaſion to lords a loſs of forfeiture, and to the delinquent a loſs of clergy. To this petition there was given this evaſive anſwer, that wherever ſuch judgment was given, the points of ſuch treaſon and accroachment were declared therein (*b*).

THO' the commons were diſappointed at this time, they did not fail of their object; for, in the 25th year of the king, there was a ſolemn declaration by ſtatute (*c*), defining very particularly what ſhould be conſidered treaſon, and what not. The treaſons declared are under the following heads: To compaſs or imagine the death of the king, queen, or that of their eldeſt ſon and heir; to violate the king's companion, or the king's eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and heir; to levy war againſt the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elſewhere; of which a man muſt be *provably attainted of open deed* by people of his own condition. Again, to counterfeit the king's great or privy-ſeal, or his money; to bring into the realm falſe money counterfeit to the money of England, as the money called *Luſhburgh*, or other, like to the money of England, knowing it to be falſe, to merchandize, or make payment in deceit of the king and his people; to ſlay the chancellor, treaſurer, or the king's juſtices of the one bench or of the other, juſtices in eyre or of aſſiſe, or any other juſtices aſſigned to hear and

Statute of treaſons.

(*a*) Britt. ch. 22. Part I. (*b*) Pet. Parl. 21 Ed. III. 15. (*c*) Ibid. ſtat. 5. c. 2.

deter-

determine, being in their places, doing their offices: all the above caſes, ſays the ſtatute, ſhall be judged treaſon that extends to our lord the king and his royal majeſty; and of ſuch treaſons the forfeiture of the eſcheats belongs to the king, as well of lands and tenements holden of another as of himſelf.

After defining what ſhould be conſidered as treaſon againſt the king's perſon and dignity, wherein the forfeiture belonged to the king, the ſtatute goes on, and ſays, there is another manner of treaſon, that is, when a ſervant ſlays his maſter, a wife her huſband, or when a man ſecular and religious ſlays his prelate, to whom he owes faith and obedience: and in theſe treaſons the forfeiture of the eſcheat is to go to the lord of the fee.

Thus far did this act ſpecify caſes of treaſon, whether *high* or *petit*; by which diſtinction they have ſince been known. "And becauſe, ſays the act, "many other like caſes of treaſon may happen in time to come, which cannot "be imagined or declared at the preſent time, it was accorded," that, ſhould any other caſe, not above ſpecified and ſuppoſed to be treaſon, happen before any juſtices, they ſhould tarry, without going to judgment, till the cauſe was ſhewed and declared before the king and his parliament, whether it ought to be adjudged treaſon or other felony; a method which we have ſeen it was uſual for the judges to take in other caſes of doubt and difficulty. This is followed by a clauſe that was intended probably as a ſatisfaction to the petition of the commons above mentioned. "If, ſays the ſtatute, any man of this "realm ride armed, covertly or ſecretly, with men of arms againſt any other "to ſlay him, or rob him, or take him, or retain him, till he has made fine or "ranſom for his deliverance, it is not the mind of the king, nor his council, "that in ſuch caſe it ſhall be judged treaſon; but ſhall be judged felony or "treſpaſs, according to the laws of the land of old time uſed, and as the caſe "required." And ſhould any lands or tenements have before that time come into the king's hands, by judgment of treaſon for any of the above offences, and had been granted to any others, the parties injured were to have writs of *ſcire facias* againſt the *terres tenants*, in which no protection was to be allowed; and if the lands remained in the hands of the king, writs were to be granted to the ſheriffs to deliver them out of the king's hands without delay. By this laſt proviſion, ſome partial redreſs was alſo given to thoſe who had already ſuffered by the oppreſſion of the old law.

Thus did Edward, by aboliſhing the many conſtructive treaſons that had before been conjured up at the pleaſure of the crown, make his ſubjects eaſy on a point the moſt important in our whole legal polity. This ſtatute may be

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be regarded in the light of a new *Magna Charta*, and a new pillar in our free conſtitution; the crime of treaſon, if indeterminate and vague, being of itſelf, according to the opinion of a great writer (*a*), alone ſufficient to make any government degenerate into arbitrary power.

THE law of treaſon was further reformed by ſtat. 34 Ed. III. c. 12. Complaint was made to parliament that eſcheators had ſeized, by colour of their office, divers lands and tenements as forfeit to the king, for the treaſon of perſons then dead, who had not been attainted during their lives. Now, it is declared, by the above ſtatute, that the king and his progenitors had been ſeiſed of *the forfeitures of wars of all times*, of which right he did not mean to diveſt himſelf, but would continue ſuch forfeitures as had fallen in his time, or that of his father (which is a declaration, that the king was entitled to certain forfeitures, without attainder, if the perſon fell in war); yet the king of his ſpecial grace granted, that of all forfeitures which fell in the time of his grandfather and other progenitors, as ſoon as an inqueſt was returned by the eſcheator or other commiſſioner into the chancery, the tenant ſhould not be put out of poſſeſſion, but ſhould be ſummoned by *ſcire facias* to ſtate what anſwer he had to make. And in all other caſes of dead perſons not attainted of treaſon, it was ordained, that they ſhould not be ſubject to any other forfeiture than the forfeitures of old time adjudged after the death of perſons, by preſentment in the eyre or in the king's-bench, as of felons *de ſeipſo*, or of others.

IT may be doubted how ſtrictly this ſtatute was obſerved; for, in the latter end of this reign, the commons petition, that none of the king's officers may ſeize lands or tenements of perſons not attainted of treaſon or felony in their life-time (*b*).

WHEN it was declared that riding armed was no longer to be interpreted treaſon (unleſs accompanied indeed with ſuch circumſtances as made it a levying war), diſorders of that ſort fell back into the conſideration they lay under at common law. Proviſion had been made by the ſtatute of *Northampton*, 2 Ed. III. c. 3. for ſuch offenders, who, it ſeems, in theſe times were very common, and created very great alarm; the courſe of juſtice, as well as the peace of ſociety, being liable to diſturbance from ſuch armed force. The nature of theſe confuſions may be imagined from the words of this ſtatute, which provided for their ſuppreſſion. It was enacted, that no man great or ſmall, of what condition ſoever (except the king's ſervants in

Riots.

(*a*) Eſp. des Loix, liv. 6. c. 7. (*b*) Pet. Parl. 50 Ed. III. 73.

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his preſence, and his miniſters in executing his precepts, or precepts of their office, and thoſe in their company aſſiſting, and alſo upon a cry made for arms to keep the peace *(a)*, and that in the places where the occaſion happened), be ſo hardy as to come before the king's juſtices, or other of the king's miniſters doing their office, with force and arms; that none bring force in affray of the peace, nor go or ride armed by night or by day, in fairs or markets, or in the preſence of the juſtices or other miniſters, or elſewhere, upon pain of forfeiting their armour to the king, and their bodies to priſon at the king's pleaſure. And it was further enacted, that the king's juſtices in their preſence, ſheriffs and other miniſters in their bailiwicks, lords of franchiſes and their bailiffs in the ſame, mayors and bailiffs of cities and boroughs within ſuch cities and boroughs, and borough-holders, conſtables, and keepers of the peace within their wards, ſhould have power to execute this act. The juſtices aſſigned were, at their coming into the country, to enquire how ſuch officers had executed this act, and to puniſh all defaults. Theſe were the methods preſcribed by the ſtatute of Northampton, which was often recurred to in ſubſequent times to ſuppreſs riots.

To go on with the laws made for the puniſhing of offenders. Hawks, as they were inſtrumental to the diverſions of the great, were put under the protection of the law, and guarded with more ſolicitude than other animals. A perſon finding a ſtray hawk was *(b)* to bring him to the ſheriff to be owned, who, after four months and proclamation made, was to keep it (if the finder was a *ſimple man*, ſays the ſtatute), making him ſome compenſation; if a *gentleman* *(c)*, and *of eſtate to have the hawk*, he was to re-deliver it to him, taking reaſonable coſts for the time he had it in his cuſtody. If any one took ſuch a hawk and concealed it from the lord or his falconers, or took it from the lord, he was, upon conviction, to ſuffer two years impriſonment, and yield to the lord the price of the hawk; and by ſtat. 37 Ed. III. c. 19. if any ſtole a hawk and carried it away, not obſerving the aforeſaid ordinance, he was to be dealt with as a thief who ſtole a horſe, or any other thing. Thus was a ſevere example ſet by the legiſlature for future regulations in protection of the game.

Two felonies were created as a ſanction to ſome commercial regulations, which, however, were ſoon repealed. By ſtat. 27 Ed. III. ſt. 1. c. 5. it was made felony to foreſtall or ingroſs Gaſcony wine, which was repealed by ſtat. 37 Ed. III. c. 16. By the ſtatute of the ſtaple,

(*a*) *De fait darmes de pees.* (*b*) Stat. 34 Ed. III. c. 22. (*c*) *Gentils homme.*

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27 Ed. III. ſt. 2. c. 3. it was made felony for any man, Engliſh, Welch, or Iriſh, to export wools, leathers, woolfells, or lead out of the kingdom; but by ſtat. 38 Ed. III. ſt. 1. c. 6. the penalty of life and member is repealed, and that of forfeiture of lands and tenements, goods and chattels, to remain.

In the early part of this reign, two new felonies had been created: one, by ſtat. 5 Ed. III. c. 2. before mentioned (which was confirmed by ſeveral (*a*) others) ordaining, that purveyors ſhould be ſubject to the ſame puniſhment as thieves and robbers, if they exceeded the limits of their authority: another is, ſtat. 14 Ed. III. ſt. 1. c. 10. which enacted, that a keeper of a gaol, who ſhould by too great dureſs compel a priſoner to become an approver, ſhould have judgment of felony.

Several laws were made to remove the great impediments thrown in the way of juſtice by conſpirators, champertors, and maintainers of quarrels and ſuits, againſt whom the legiſlature in the reign of Edward I. had made ſo many proviſions. In ſtat. 1 Ed. III. ſt. 2. c. 14. the king commanded, that none of his counſellors, nor of his houſe, or of his miniſters, nor any man, great or ſmall, of the realm, ſhould by himſelf, or by others, in ſending letters, or by other means, take upon them to maintain quarrels and parties in the country, to the diſturbance of the common law. To forward the proſecution of ſuch offenders, it was ordained by ſtat. 4 Ed. III. c. 11. that the juſtices of one bench or the other, and the juſtices of aſſiſe, when they came to hold their ſeſſions, or to take inqueſts by *niſi prius*, ſhould enquire and determine on theſe offences, either at the ſuit of the king or the party, namely, of maintainers, bearers, and conſpirators, and thoſe who committed champerty, the ſame as juſtices in eyre before might; with a power to adjourn ſuch matters as could not be determined, by the ſhortneſs of time, into the court to which they belonged. A ſimilar injunction about maintenance was made in ſtat. 20 Ed. III. c. 4. and by chap. 5. of the ſame act, great men were enjoined to diſmiſs from their ſervice all maintainers, and others who took upon them to interfere in ſuits, and impede the courſe of the law. The writ of champerty was ſtill conſidered only as a criminal proceeding; for in the 50th year of the king the commons prayed, that the chancellor might in ſuch caſes grant a writ at the ſuit of the party, to recover damages in his ſuit; which, however, was denied by the king (*b*).

(*a*) Stat. 25 Ed. III. ſt. 5. c. 15. Stat. 36 Ed. III. c. 2. (*b*) Pet. Parl. 50 Ed. III. 80.

THE other ſtatutes upon the ſubject of criminal law may be conſidered as making ſome alteration in the courſe of bringing offenders to juſtice, the manner of proceeding there, and the execution of the law upon them.

THE ſtatute of Wincheſter paſſed in the reign of Edward I. and all laws for the ordering of the police, may be treated as ordinances calculated for the better diſcovery and bringing to juſtice of ſuſpected perſons; that being one of their great objects. It had been ordained by the ſtatute of Wincheſter *(a)*, that any ſtranger paſſing the country in the night, might upon ſuſpicion be arreſted, and delivered to the ſheriff. It was now ordained, that becauſe many felonies had lately been committed, by perſons called *roberdeſmen*, *waiſters*, *and draw-latches*, any perſon ſuſpected of being ſuch might be arreſted, *by day or by night*, by the conſtables of the town (if within a franchiſe, by the bailiff), and delivered to the ſheriff, to be kept in priſon till the coming of the juſtices of gaol delivery. In the mean time the ſheriff and bailiffs of the franchiſe were to make inquiry about the arreſt, and return the inqueſt, with the finding, to the juſtices when they came; and if they did not make ſuch inquiry, they were to be amerced, and the juſtices were to do it before they proceeded to the deliverance. In the 10th year of the king certain *articles of the peace* were tranſmitted into different counties; but it was ſpecially reſolved by the parliament, that they ſhould not be conſidered as a ſtatute. By ſtat. 28 Ed. III. c. 11. ſtrong injunction is given for the execution of the 2d chapter of the ſtatute of Wincheſter (concerning hue and cry, and recovery againſt the hundred), which is ſpecially there re-enacted.

THUS far of bringing offenders into court: next, as to the proceeding there. It ſeems, that at this time actions for defamation were brought in the eccleſiaſtical court, as ſubjects of ſpiritual cognizance only. But this proceeding was carried to great lengths, when perſons indicted in ſheriffs' tourns, and afterwards acquitted before the juſtices by a procured inqueſt, would bring a ſuit in the eccleſiaſtical court againſt the indictors for defamation. This being complained of by the commons, it was enacted by ſtat. 1 Ed. III. ſt. 2. c. 13. that every perſon ſo grieved ſhould have a prohibition in the chancery, formed upon his caſe.

Of indictments

TO inſure the due proſecution of indictments when found, it was enacted by chap. 17. of the ſame ſtatute, that ſheriffs and bailiffs of franchiſes, and

(*a*) 13 Ed. I. c. 4. 1ſt Part.

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all others that took indictments in their tourns or elſewhere, ſhould take them by roll indented (*a*); one part of which to remain with the indictors, the other with him who took the inqueſt. This was done in order to prevent the embezzlement of indictments, which had been much practiſed. It being the common courſe for indictments to be taken before ſheriffs and other inferior magiſtrates, but the trial of them, or, as they called it, the priſoner's deliverance, to be deferred till the juſtices came into the country for that purpoſe, it is not to be wondered, that in ſuch an interval many unfair practices were attempted. It was this alſo which gave room for the indictors to get themſelves put on the inqueſt of deliverance; and therefore it was one of the commoneſt challenges taken to jurors, that they were one of the indictors (*b*). But notwithſtanding the old law allowed this challenge, it is doubtful how far it was obſerved; for we find a petition of the commons in the 14 Ed. III. (*c*) for a law to confirm it. This was at length done by ſtat. 25 Ed. III. ſt. 5. c. 3. which enacts, that no indictor ſhould be put on inqueſts upon deliverance of the indictees of felonies or treſpaſs, if he was challenged for ſuch cauſe by the perſon indicted.

It ſeems that ſheriffs extremely abuſed this authority to take indictments. It is recited by ſtat. 28 Ed. III. c. 9. that ſheriffs uſed to procure commiſſions and general writs empowering them to take indictments; and having under ſuch authority cauſed many to be indicted, would take fine and ranſom of them, and then deliver them, inſtead of keeping them in cuſtody till the coming of the juſtices, as the regular courſe was. It was declared, that all ſuch commiſſions and writs ſhould be void, and that in future no ſuch ſhould iſſue.

Another oppreſſion was practiſed, not only by ſheriffs, but gaolers and keepers of priſons, as well within franchiſes as without, who by dureſs and ſeverities would compel their priſoners to become approvors, and appeal innocent people, in order to obtain fines for diſpenſing with their impriſonment. By ſtat. 1 Ed. III. ſt. 2. c. 7. the juſtices of the one bench and the other, and juſtices of aſſiſe and gaol delivery, were empowered to hear all complaints of this ſort by bill, as well at the ſuit of the party as of the king. This offence in keepers of priſons (for ſheriffs are not named) was by ſtat. 14 Ed. III. ſt. 1. c. 10. made felony, as has been before obſerved.

(*a*) Part I. 441. (*b*) Part I. 481. (*c*) Pet. Parl. 14 Ed. III. 30.

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As the law now ſtood, a felon who was indicted or outlawed in one county, and dwelt in another, as he was out of the ſheriff's juriſdiction, could not be attached. It was therefore enacted by ſtat. 5 Ed. III. c. 11. that the juſtices aſſigned to hear and determine ſuch felonies ſhould direct their writs to all counties in England, to take perſons ſo indicted; a remedy which effectually removed all difficulties.

Jury de mediate linguæ.

We have ſeen the privilege granted by the ſtatute of the ſtaple in favour of foreign merchants, to have an inqueſt mixed of natives and foreigners, where the one party was of this country, and one of another. This was confined to matters of contract; but by ſtat. 28 Ed. III. c. 13. this was extended to criminal caſes in the following explicit manner: It was enacted, that in all inqueſts and proofs to be taken or made amongſt aliens and denizens, whether merchants or others, as well before the mayor of the ſtaple as any other juſtices or miniſters, *although the king be party* (as in all criminal caſes he is), the one half of the inqueſt or proof ſhould be denizens and the other aliens, if ſo many aliens and foreigners were in the place: if not, then as many as could be found, and the remainder to be denizens. This liberal ſpirit towards foreigners had been diſtinguiſhing itſelf thro' the whole of this reign, particularly in matters that concerned the intereſts of commerce. Some years before, the invidious diſtinction that had been kept up between Engliſh and French by preſentments of *Engliſhery*, was removed, by the entire abolition of that proceeding (*a*). However, the reaſon ſtated by the ſtat. 14 Ed. III. ſt. 1. c. 4. for this alteration is of a different kind, namely, that counties were amerced without any knowledge of preſentments of Engliſhery, which was a ſurprize and oppreſſion to the people; and for this reaſon they were no more to be received by the juſtices errant.

The benefit of clergy.

The exemption from all ſecular animadverſion claimed by the clergy for the perſons of clerks, made a conſiderable title in the criminal law of theſe times. Notwithſtanding the firmneſs with which it was demanded on one ſide, and the indulgence which the laity in general gave to the claim; tho' it was confirmed by ſolemn declarations and aided by long preſcription, it was always viewed with jealouſy, and conſidered rather as an uſurpation which was for particular reaſons endured, than an eſtabliſhed and unqueſtionable part of the old common law. Under ſuch a title, this privilege muſt depend on the circumſtances of times for its ſupport: we accordingly

(*a*) Part I. 351.

find

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find it, one while reſpected, and at another diſregarded, by the government. In the 18th year of the king it was enacted *(a)*, that an archbiſhop ſhould not be impeached criminally before the king's juſtices. This might perhaps be rather a law in protection of the peerage than of the clergy, and was occaſioned by the late diſputes the king had with the archbiſhop. In the 25th year of this king the clergy complained in parliament, that a certain knight, being one of the clergy, had judgment of treaſon given againſt him, to be hanged and quartered: they complained alſo of a like judgment againſt a prieſt for killing his maſter. Theſe encroachments, as they called them, or at leaſt theſe ſymptoms of the precarioufneſs of the privilege claimed by clerks in criminal queſtions, required an act of parliament to adjuſt and define it. Accordingly, in the famous ſtatute *de clero*, 25 Ed. III. ſt. 3. which was made to aſcertain ſome other of their claims, two chapters were inſerted for this very purpoſe. By ch. 2. it was enacted, that all manner of clerks, as well ſecular as religious, which ſhould be convicted before any ſecular juſtices, for treaſon or felony touching other perſons than the king himſelf or his royal majeſty, ſhould from thenceforth freely have and enjoy the privilege of holy church, and ſhould, without any impeachment or delay, be delivered to the ordinaries demanding them. In conſideration of this grant, and that it might not be productive of an entire failure of juſtice, the ſtatute ſays, the archbiſhop promiſed the king, that he would procure an ordinance to be made for the puniſhment and ſafe cuſtody of clerks ſo delivered to the ordinaries, in order that no clerk might be encouraged to offend through want of correction.

Another complaint of the clergy was, that when clerks were demanded by their ordinary, they were often remanded to gaol by the juſtices, under ſurmiſe that there were other charges againſt them; though the common law required that a clerk ſhould not, in ſuch caſe, be remanded to gaol, but ought to be preſently arraigned of all his offences, or otherwiſe delivered to the ordinary: accordingly it was ordained by ch. 3. of this ſtatute, that all juſtices and ſecular judges throughout the realm ſhould obſerve this point.

The conſequences that followed from this laſt chapter of the ſtatute will be ſeen hereafter. The former, though nothing more than a declaration of the common law with reſpect to the perſons intitled to the privilege, yet, from the general way in which it is worded, had the effect of extending

(*a*) Stat. 18 Ed. III. ſt. 3. c. 1.

this

this privilege to ſome felonies which did not before enjoy it; and took it from ſome treaſons where before it was allowed. Thus, among other felonies, it was extended to the felonious burning of houſes; an offence which at common law was not allowed clergy. On the other hand, by the common law recogniſed by this ſtatute, all treaſons except thoſe againſt the king's perſon and dignity were intitled to clergy: accordingly, the offence of coining and ſome others were intitled to this benefit. But this crime being by the ſtatute of treaſons *(a)* expreſsly raiſed from the order of common treaſons to the rank of one againſt the king's perſon and dignity, it became *eo nomine* excluded from clergy by the exception of treaſons againſt the king's perſon in the ſtatute *de clero*, ch. 2. Thus, when theſe two ſtatutes are put together, we find the old diſtinction between treaſons clergyable and not clergyable ſtill remained, and grounded upon the ſame principle as at common law, namely, as they were againſt the king's perſon or not. Treaſons not againſt the king's perſon, namely, thoſe which have ſince been called petit treaſon, were ſtill intitled to their clergy; and treaſons againſt the king's perſon (which have ſince been denominated high treaſon) were *eo nomine* deprived of clergy.

Of pardons.

THERE was thro' all this reign great complaint of the too eaſy granting of pardons, which contributed greatly to encourage manſlaughters, robberies, felonies, and other treſpaſſes. To put ſome check upon this, it was ordained by the ſtatute of Northampton, ſtat. 2 Ed. III. c. 2. that charters of pardon ſhould not be granted except where the king could do it conſiſtently with his oath, which the ſtatute explains by ſaying, where a man ſlayeth another in his own defence, or by misfortune. That ſtatute was confirmed by ſtat. 10 Ed. III. ſt. 1. c. 2. and as a further ſecurity, it was ordained by ch. 3. of the ſame ſtatute, that all thoſe who already had charters of pardon ſhould, by a certain time, come before the ſheriffs and coroners of the counties, and find ſix good and ſufficient mainpernors to bear themſelves well and lawfully; and ſuch as did not find ſuch mainpriſe, or, having done ſo, broke the peace, their charters were to be void. And in caſe of future pardons, the parties, within three months after the granting, were to find the like mainpernors, and the pardons to be void as in the former caſe. This was doing ſomething more than had been effected by the general declaration of the ſtatute of Northampton; and ſtat. 14 Ed. III. ſt. 1. c. 15. went ſtill farther, by declaring all pardons granted contrary to that ſtatute to be void. In the 21ſt year of the king there was a petition of the commons on this

(*a*) Vid. antea

ſubject;

ſubject; when the king anſwered, that he would adviſe with his council, ſo that no ſuch charter ſhould be granted, unleſs it was for the honour of himſelf and his people (*a*). At length the evil of improper pardons was attributed to the feigned and untrue ſuggeſtions upon which they had been obtained. It was therefore enacted by ſtat. 27 Ed. III. ſt. 1. c. 2. that in every charter of pardon granted on the ſuggeſtion of any one, the ſuggeſtion, and the name of him that made it, ſhould be comprized in the charter; and ſhould the ſuggeſtion be afterwards found untrue, the charter was to be void. The juſtices before whom they were alledged were to enquire of ſuch ſuggeſtions, and if they appeared untrue, they were to diſallow the pardon: this was to extend as well to pardons already granted, as to thoſe in future. This ſeemed the moſt effectual of all the remedies hitherto deviſed, as it, after all, left the party to the judgment of the common law.

Proceſs of capias and exigent.

THERE was an act made for the government of proceſs before the juſtices of *oyer* and *terminer*, that deſerves notice, as it ſettled that point very particularly. It was enacted by ſtat. 25 Ed. III. ſt. 5. c. 14. that after a perſon was indicted of felony before the juſtices in their ſeſſions of *oyer* and *terminer*, it ſhould be commanded to the ſheriff to attach his body by writ or precept, called a *capias*; and if the ſheriff returned in the writ that the body was not found, another writ of *capias* ſhould incontinently be made returnable at three weeks; and in the ſame writ or precept it was to be compriſed, that the ſheriff ſhould cauſe his chattels to be ſeized and ſafely kept till the return-day of the writ. And if the ſheriff returned, that the body was not found, and the indictee came not, the *exigent* was to be awarded, and the chattels forfeit, as the law of the crown ordained; but if he came and yielded himſelf, or was taken by the ſheriff or other officer before the return of the ſecond *capias*, then the goods and chattels were to be ſaved. As the *capias* was thus allowed in the firſt inſtance inſtead of the attachment, it was thought reaſonable not to deprive the proſecutor of the effect of the old proceſs of attachment, which in the ſecond writ always contained a diſtreſs of the goods.

IN the 18th year of the king two acts were made to ſettle the proceſs of *exigent* and *outlawry* in particular caſes. It was enacted and declared by ſtat. 18 Ed. III. ſt. 1. that the *exigent* ſhould lie in the following caſes, and in no other: Againſt thoſe who receive the king's money or wools, taking them of the people, and then carrying them away, in fraud of the king: againſt thoſe who bring wools to the parts beyond the ſeas, without being cocketted, or

(*a*) Pet. Parl. 21 Ed. III. 53. 62.

paying

paying cuſtom or ſubſidy, according to the aſſeſſment; and alſo againſt cuſtomers and finders *(a)* who connive at the ſame; and alſo againſt lay-miniſters who receive the king's money and retain it: againſt conſpirators, confederators, and maintainers of falſe quarrels: againſt thoſe who bring routs in the preſence of the juſtices or other the king's miniſters, or elſewhere in the counties, in affray of the people, to obſtruct the courſe of law: againſt thoſe who bring, or procure falſe money to be brought. If none of the above offenders could be brought in by attachment and diſtreſs (for that was always to be the firſt proceſs), then an *exigent* was to go. It is clear this parliamentary declaration was only to ſettle the courſe in the particular caſes there mentioned; and it was not intended (notwithſtanding the general way in which it is worded, *and not againſt any other*) that an *exigent* ſhould lie in no other caſe; for if ſo, it would not have lain in robbery, murder, and many other felonies, contrary to the plaineſt ſenſe of the old law. It appears, that it was only intended to remove ſome doubts which were entertained at this time concerning proceſs of outlawry in certain caſes of *treſpaſs*, of which ſort were many of the inſtances recited in the above ſtatute; for it was in the ſame year enacted by ſtat. 18 Ed. III. ſt. 2. c. 5. in a more general way, that no *exigent* ſhould thenceforth iſſue, in caſe where a man was indicted of *treſpaſs*, *unleſs it was againſt the peace*, *or* of things contained in the before-mentioned act. We ſee that there had already grown a diſtinction between treſpaſſes, ſome being conſidered as againſt the peace, others not. When this had once prevailed in caſes that were treated criminally, the way was opened for improving on the idea in civil writs of treſpaſs, which we ſhall hereafter ſee were, upon this principle, branched out into ſuch as were *vi et armis*, and ſuch as were not.

It was endeavoured to make an alteration in the law of forfeiture in caſes of felony, but the attempt did not ſucceed. In the 21ſt of Edward III. the commons complained that a man indicted or appealed of felony, who did not ſurrender himſelf at the *exigent*, forfeited his chattels, without enquiry whether he fled or withdrew himſelf, although he was acquitted of the felony. Now as a man might be indicted in a foreign county, and be ignorant of any proceeding againſt him, they prayed, that no man ſhould loſe his chattels but where it was found by verdict that he fled. To this it was anſwered, that the ancient law ſhould be kept till the king by advice of his council ſhould otherwiſe ordain *(b)*.

(*a*) *Quære*, if not ſearchers. (*b*) Parl. Pet. 21 Ed. III. 35.

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It was alſo attempted to change the law as far as regarded the forfeiture of the wife's dower by the felony of the huſband (*a*). The commons preſented a petition to this effect in the 1ſt of Edward III. (*b*) but it was not aſſented to.

The law had always required ſuggeſtions in writs to be particular and preciſe; the ſame in appeals: but nothing has yet appeared of the forms of indictments. As it was not till the time of Edward I. that theſe were put into writing, there had not been ſufficient leiſure to diſcuſs the circumſtances and property thereof. But we find, that certain indictments againſt ordinaries and their miniſters, for extortions and oppreſſions, had occaſioned clamour, becauſe they did not ſufficiently put in certain the offence charged. To remedy this, it was enacted, by ſtat. 25 Ed. III. ſt. 3. *de clero*, c. 9, that juſtices ſhould not put ordinaries or their miniſters to anſwer upon indictments for *general* extortions or oppreſſions, unleſs they put in certain in what manner ſuch extortions or oppreſſions had been committed.

Origin of juſtices of the peace.

In this reign ſeveral regulations were provided for the keeping and maintenance of the *peace*; which, beſides increaſing the powers of ancient magiſtrates, new-modelled ſome of them, and created new ones which were thought to be better calculated for ſuch an employment. The ſtatute of Wincheſter was the great ſyſtem of police in theſe days, and on the full execution of that was thought to depend the domeſtic peace of the whole kingdom. For puniſhing the breach of this ſtatute, and reſtraining other offences more immediately concerning the police, was the commiſſion of *oyer* and *terminer* called *trailbaſton* inſtituted by Edward I.

The *peace*, in the moſt extenſive ſenſe of the word, took in, perhaps, the whole of the criminal law; and as moſt offences were ſaid to be againſt the peace, all thoſe magiſtrates who had authority to take cognizance of ſuch offences, might be conſidered as a ſort of guardians of the peace *ex officio*: ſuch were the king's juſtices, inferior judges, and miniſters of juſtice, as ſheriffs, conſtables, tything-men, headboroughs, and the like; all theſe were *ex officio* guardians and conſervators of the peace. Others were conſervators of the peace by tenure or preſcription; others were elected in full county court, in purſuance of a writ directed to the ſheriff for that purpoſe. Beſides theſe, extraordinary ones were appointed occaſionally by commiſſion from the king (*c*). The manner in which theſe officers might exerciſe their authority was, by committing thoſe whom they ſaw actually breaking the

(*a*) Part I. (*b*) Parl. Pet. 1 Ed. III. 13. (*c*) Lamb. Iren. book 1. c. 3.

peace;

peace; or, as is ſaid, they might admit them to bail, or oblige them to give ſureties for keeping the peace. This might be done by them all, even down to the conſtable *(a)*.

THE violent concluſion of the laſt reign by the impriſonment, depoſal, and murder of the old king, ſucceeded by the elevation of a minor to the throne, occaſioned the appointment of certain new officers, in whom the court might have more truſt than in the common conſervators. Apprehending that ſome might be alarmed at the proceedings of the court, and that others might take advantage of the unſettled ſtate of the executive power to raiſe diſturbance, ſpecial orders were iſſued, in the name of the new king, to every ſheriff to preſerve the peace of the county; and, in a few weeks after, it was ordained by ſtat. 1 Ed. III. c. 16. "for the better keeping and maintenance "of the peace, that in every county, good men and lawful, that were no "maintainers of evil, or barrators in the country, ſhould be aſſigned to keep "the peace." This ſhort and general act gave a very confined authority to theſe new officers; the perſons appointed by this act being nothing more than conſervators of the peace nominated by the crown, as auxiliary to thoſe who were ſuch by the titles above-mentioned. Indeed, they ſeem very little more than ſuch officers as were appointed in the reign of Edward I. for the particular purpoſe only of attending to the due execution of the ſtatute of Wincheſter; from which ordinance probably it was, that the preſent hint was taken.

THREE years after this, theſe officers were intruſted with greater powers, having the additional authority to take indictments. It was enacted by ſtat. 4 Ed. III. c. 2. (after ſome regulations for the appointment of juſtices of aſſiſe and gaol-delivery) that there ſhould be *aſſigned* good and lawful men in every county to keep the peace; and that at the time of the *aſſignment*, mention ſhould be made, that ſuch as ſhould be indicted or taken by the ſaid keepers of the peace, ſhould not be let to mainpriſe by the ſheriffs, or their miniſters, if they were not by law mainpernable; and that ſuch as were indicted ſhould not be delivered but at the common law: and the juſtices of gaol-delivery were to have power to deliver the gaols of ſuch as were indicted befor the keepers of the peace; and the ſaid keepers were directed for that purpoſe to ſend their indictments before the juſtices. And it was further enacted, that the ſaid keepers ſhould have power to enquire of ſheriffs, gaolers,

(*a*) Lamb. Iren. pa. 14, 15.

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and others, in whoſe ward ſuch indicted perſons ſhould be, if they made deliverance, or let to mainpriſe, any ſo indicted not being mainpernable; and they were to puniſh ſuch officers, if they did any thing againſt this act.

After this, there was no alteration in their authority till the 18th of this reign, when they were empowered to *hear and determine*. It was enacted by ſtat. 18 Ed. III. ſt. 2. c. 2. that two or three, of the beſt reputation in the counties, ſhould be aſſigned keepers of the peace by the king's commiſſion; and when need ſhould be, they, with others wiſe and learned in the law, ſhould be aſſigned by the king's commiſſion to *hear and determine* felonies and treſpaſſes done againſt the peace in the ſame counties, and to inflict puniſhment according to law and reaſon, and the circumſtances of the fact. When, in the twentieth year, it was prayed by the commons, that they might have a power to hear and determine felonies, it was anſwered, that the king would appoint learned perſons for that office *(a)*.

So beneficial was this eſtabliſhment of keepers of the peace conſidered by the people, that it became a favourite in the country, to the excluſion of ſome inſtitutions which were more antient. In the twenty-firſt year of the king, the commons being charged to adviſe the king what was the beſt way of keeping the peace of the kingdom, they recommended, that ſix perſons in every county, of whom two were to be *des plus grantz*, two knights, and two men of the law, and ſo more or leſs as need ſhould require, ſhould have power and commiſſion out of chancery to hear and determine the keeping of the peace; and that all courts of *trailbaſton* ſhould ceaſe, they being oppreſſive to the people, and contributing nothing towards preſerving the peace, nor the puniſhment of felons or treſpaſſors *(b)*.

In conformity with theſe ſeveral ſtatutes and petitions, commiſſions had been at various times framed, *aſſigning* certain perſons to execute the powers which the ſtatutes authorized the king to confer. In theſe commiſſions were inſerted, beſides the general powers for keeping the peace, a ſpecial charge to enforce the obſervance of certain ſtatutes. Thus in the ſecond year of this king, they had the ſtatute of Wincheſter in charge; in the twentieth year the ſtatute of Northampton, and 5 Ed. III. c. 14. againſt roberdſmen, draw-latches, &c. *(c)*. In the twenty-fifth of this king, ſtat. 1. (commonly called the ſtatute of labourers) we find that *juſtices* were to be aſſigned for the execution of that act *(d)*; and they were to hold a ſeſ-

(*a*) Parl. Pet. 20 Ed. III. 29. (*b*) Parl. Pet. 21 Ed. III. 70. (*c*) Lamb. Iren. b. 1. c. 9. (*d*) Ch. 3.

ſion

ſion in all the counties of England four times in the year; that is, at the feaſt of *the Annunciation* of Our Lady, Saint *Margaret*, Saint *Michael*, and Saint *Nicholas (a)*. It is moſt probable the perſons aſſigned *juſtices* to execute this ſtatute were the keepers of the peace, who having already by ſtat. 18 Ed. III. an authority to hear and determine, might with propriety enough be called *juſtices*; though there is no trace of their being actually ſo called till ſeventeen years after. And indeed the authority given by that ſtatute is to them, not ſingly, but jointly with others, as occaſion ſhould require; their own commiſſion going no further than to the bare keeping of the peace *(b)*. And as the general ſtanding authority to hear and determine was not given till ſtat. 34 Ed. III. it was not probably till then that they were commonly reputed and called *juſtices*, as we find they are by ſtat. 36 Ed. III.

THE ſtat. 34 Ed. III. c. 1. is more full than any of the former in ſetting forth the qualifications of theſe new officers, and the extent of their power. It enacts, that in *every* county there ſhould be aſſigned for the keeping of the peace, one lord, and with him three or four of the moſt worthy *(c)* in the county, with ſome learned in the law. Theſe were to have power to reſtrain offenders, rioters, and all other barrators, and to purſue, arreſt, take, and chaſtiſe them according to their treſpaſs or offence; and cauſe them to be impriſoned and duly puniſhed, according to their diſcretion and judgment; and the act directs them "alſo to inform themſelves, and to "inquire of all thoſe who had been pillors and robbers in all the parts beyond "the ſea, and were now returned, and went wandering about, not labour-"ing as they were wont in times paſt; and to take and arreſt all they find, "by indictment, or by ſuſpicion, and to put them in priſon; and to take "of ſuch as were not of good fame, wherever they were found, ſufficient "ſurety and mainpriſe of their *good behaviour* towards the king and his "people, and to duly puniſh others; to the intent that people, merchants, "and other travellers might not be endangered by ſuch rioters and rebels; "and alſo to hear and determine, at the king's ſuit, all manner of felonies "and treſpaſſes done in the ſame county, according to the laws and cuſtoms "of the realm." This was the firſt authority they had to take ſureties for good behaviour, and indeed the firſt mention of it in any ſtatute or law book. By ch. 5. of the ſame act, thoſe who were aſſigned to keep the peace were empowered to enquire of meaſures and of weights, according to ſtat. 25 Ed. III. ſt. 5. c. 9.

(*a*) Ch. 7. (*b*) Lamb. Iren. 20, 21, 22, 23. (*c*) *Des multz vauez.*

THE

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THE laſt ſtatute concerning the keepers of the peace is ſtat. 36 Ed. III. ſt. 1. c. 12. which enacts, that in the commiſſions of *juſtices* of the peace (for ſo they were now called) and of labourers, expreſs mention ſhould be made, that they hold their ſeſſions four times in the year; one ſeſſion within the *utas* of the Epiphany, the ſecond within the ſecond week of Lent, the third betwixt the feaſt of Pentecoſt and St. John the Baptiſt, the fourth within eight days of St. Michael.

THUS ſtood the commiſſion of the peace at the cloſe of this reign. The keepers of the peace were become juſtices, preſiding over a court, where many matters of conſiderable importance to the order and quiet of ſociety were cognizable, beſides the important juriſdiction over felonies and treſpaſs. The conſideration of theſe magiſtrates was greatly heightened by the acceſſion of buſineſs that was thrown upon them by later acts of parliament, which have gradually entruſted them with matters of ſtill greater conſequence to the property and liberty of the ſubject.

CHAP.

CHAP. XI.

EDWARD III.

Of Deſcent—Limitations in Tail and Remainder—Tenant in Tail after Poſſibility, &c.—Wills of Land—Of Warranty with Aſſets—Of barring Entails—Of Chattels—Of Entry congeable—Diſcontinuance—Remitter—Of Aſſiſes—Of Colour—De Ejectione Firmæ—Writs of Entry—Writs of Right—Other real Writs—Action of Debt—of Detinue—of Accompt—of Treſpaſs—Of Actions on the Caſe—Proceedings by Bill, &c.—Of Pleading—The Secta, and Law-wager—Trial by Proofs, and other Trials—Trial per Pais—Of the Venue—Of Proceſs—The Crime of Treaſon—Homicide—Larceny—Burglary—Appeals—Indictments—Of Penance—Trial by Battel and Jury—Sanctuary and Clergy—Of Forfeiture—The King and Government—The Nova Statuta—Reports—Old Tenures—Natura Brevium—Novæ Narrationes—Miſcellaneous Facts.

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THAT ſyſtem of law which was diſcourſed upon ſo fully in the reign of Henry III. continued ſtill to prevail, with ſuch ſmall alteration in the form and circumſtances, as had been adopted by the courts, or impoſed by parliament in the two intermediate reigns. Other ſeeming changes alſo had crept in, which upon examination appear nothing more than new words and terms to expreſs old ideas. Theſe however cannot be paſſed over in a work which pretends to throw new light upon the law, by conſidering it hiſtorically; a novelty in expreſſion being alone ſufficient to obſcure a ſubject, otherwiſe ever ſo well underſtood.

NOTWITHSTANDING the canoniſts had failed in the reign of Henry III. in their attempt to introduce their law of legitimacy *(a)*, by which a child born before marriage, if marriage followed, was conſidered as lawful heir; yet the law of England had ſuffered ſuch iſſue to obtain a degree of right and preference before other children born out of wedlock. A child ſo born

(*a*) Stat. Mert. Part I. 201. 85.

was

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was called a *baſtard eignè*, to diſtinguiſh it from the child born after marriage of the ſame mother, which was called *mulier puiſnè*; the term *muliera-tus* being aſſigned to perſons of this ſort in the time of Glanville. It had become the law of deſcent, that if a perſon died ſeiſed in fee, leaving iſſue a *baſtard eignè*, and *mulier puiſnè*, and the baſtard entered and died ſeiſed, ſuch regard ſhould be paid to this undiſturbed poſſeſſion, ſanctioned afterwards by a diſcent in a lawful way on his iſſue, that the mulier ſhould be precluded from entering on the iſſue. Such was the law in the early part of this reign, and, no doubt, long before *(a)*.

MANY points aroſe upon this new piece of law, and many were ſettled in this king's time. It was ſaid, the right in the iſſue accrued by the dying ſeiſed of the anceſtor; therefore if any thing happened that in other caſes would take off the effect of a dying ſeiſed, the mulier was not barred. Thus it was held, that ſhould the diſcent happen while the mulier was within age, he ſhould not be barred *(b)*. Again, where the baſtard entered, and continued ſeiſed for eight years, and then infeoffed another, who died ſeiſed without any interruption, it was thought ſuch dying ſeiſed would not bar the mulier; but that caſe happened to be decided upon the nonage of the mulier *(c)*. This privilege of the baſtard only availed his iſſue as againſt the mulier and his iſſue, and not againſt a ſtranger; nor would it avail againſt the iſſue of the mulier, if they claimed under an intail. Where land was given in tail, remainder over in tail; and the firſt tenant in tail had iſſue a baſtard and mulier, and died ſeiſed; the baſtard entered, continued in poſſeſſion, had iſſue, and died ſeiſed; the iſſue entered, the mulier died without iſſue; it was held the ſecond remainder-man ſhould have a formedon, not being bound by the diſcent on the iſſue of the baſtard *(d)*.

THE maxim of *poſſeſſio fratris de fædo ſimplici facit ſororem eſſe hæredem*, or, in a more general ſenſe, the rule of excluding the half blood, was held to as ſtrict a conſtruction as that above mentioned. If a perſon was ſeiſed in tail, and died leaving two ſons by different venters, the youngeſt would inherit to the eldeſt, *per formam doni*; being heir of the body in tail, tho' not in fee-ſimple. Thus this maxim *(e)*, and the excluſion of the half blood was confined to eſtates in fee-ſimple wholly, and to ſuch as were in *poſſeſſion*. Upon the point of poſſeſſion, many doubtful caſes aroſe. A man, having a

(a) 21 Ed. III. 34. (b) 31 Aſſ. 18. 22. & Bro. diſcent. 49. (c) 36. Aſſ. 2. (d) 39 Ed. III. 38. (e) 37 Aſſ. 15. 24 Ed. III. 30.

ſon

ſon and daughter by one venter, and a ſon by another, gave his land to his eldeſt ſon in tail, and then died; ſo that the fee deſcended on the eldeſt ſon, who was now ſeiſed in tail with a reverſion in fee; and ſo died without heirs of his body; in which caſe it was held the youngeſt ſon ſhould have the land, and not the daughter *(a)*. Again, land was given to a baron and feme, and the heirs of their body, remainder to the right heirs of the baron, and they had iſſue a ſon, and the feme died; the baron married, and had iſſue another ſon, and died; the eldeſt ſon entered, and died ſeiſed without iſſue: here it was held, that the land belonged to the younger ſon of the half blood; for the elder was only *ſeiſed of* the entail, and was not in poſſeſſion of the reverſion *(b)*.

In order for this rule to take effect, the reverſion ſhould come into *actual poſſeſſion*. A man ſeiſed in fee leaſed his land for life, and then had a ſon by one venter, and a daughter by another; and died, after the time at which the rent was payable, but without receiving it; and then the ſon died before the next day of payment; ſo that he had only a ſeiſin in law of the rent, and not in fact: after this the tenant for life died; and it was held, that the reverſion went to the daughter, and not to the ſon of the whole blood, becauſe the father was the perſon laſt ſeiſed; the reverſion never having fallen into poſſeſſion during the life of the elder ſon *(c)*. Where a guardian entered during the infancy of an elder ſon, and aſſigned dower to the widow, it was held, that the poſſeſſion of the guardian was ſufficient ſeiſin of the heir, to exclude the half blood; but the part held in dower prevented that ſeiſin, ſo that the land deſcended to the half blood *(d)*.

The interpretation of the ſtatute *de donis*, and the whole doctrine of entails and remainders, was debated in every point of view. Limitations of a new impreſſion were deviſed for the purpoſe of ordering property conformably with the wiſhes of its owners; and doubts were ſometimes raiſed upon theſe, whether they were within the meaning of that famous act. But tho' no more than three ſpecies of entails are mentioned in that act, the courts had been diſpoſed to bring almoſt every ſort of conditional fee within the equity of it. We find in this reign the following gifts in tail and remainder: Firſt, To a baron and feme, and the heirs that the baron ſhall beget on the feme. Secondly, To a man and his heirs, if he has iſſue of his body; and if he dies without heirs of his body, remainder over. Thirdly, To a

Limitations in tail & remainder.

(*a*) 24 Ed. III. 13. (*b*) 37 Aſſ. 4. (*c*) Bro. diſcent 28. (*d*) 8 Aſſ. 6.

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man and his heirs, if he has any *de carne ſuâ*; if not, reverſion to the donor. Fourthly, To baron and feme, *et uni hæredi de corpore ſuo legitimè procreato, et uni hæredi ipſius hæredis*. Fifthly, To a man and his ſiſter, and the heirs of their two bodies begotten. Sixthly, To two men, and the heirs of their two bodies begotten. Seventhly, To a man, and the heirs male of his body; we find remainders of the following kind: to a father for life, remainder to the eldeſt ſon, and his wife in tail, remainder to the right heirs of the father; a leaſe for life, remainder over in fee; a gift in tail, remainder to the donor for life, remainder over in fee; and the like, which may be eaſily imagined after theſe inſtances.

The firſt of the above-mentioned limitations was conſidered as a ſpecial tail, as well in the feme as in the baron (*a*). In the ſecond and third entails, it was argued, that the gift was in fee-ſimple on the condition and terms of the tenant having heirs of his body; which event taking place, the eſtate deſcended to his right heirs: but this conſtruction was overruled, and they were held to be limitations in tail (*b*). The entails to *two men*, and thoſe to *a man and his ſiſter*, and the heirs of their bodies, were allowed ſufficient and lawful, upon this reaſon: That they might each have ſuch *heirs* of their bodies as would ſatisfy the deſcription of the entail (*c*). The gift to a man, *and the heirs male of his body*, called upon the court to explain at large the force of the ſtatute, as to diſcents in tail. The donee in that caſe had iſſue a daughter, who had iſſue a ſon, and then died; and it became a queſtion, whether the grandſon ſhould ſucceed. It was argued, he ſhould be heir in tail, becauſe in ſuch a gift at common law the iſſue would inherit in fee, on account of the word *heirs*, and the power the anceſtor, after iſſue, had of aliening; and as the ſtatute only reſtrains from alienation, when that was complied with, and the land left to diſcent, it was contended the grandſon ſhould take as before the ſtatute, that is, in fee-ſimple. But it was reſolved this was a gift in tail, which did not give an inheritance ſo largely as a gift to a man and the heirs of his body; upon which the other ſide ſeemed to argue, that there indeed the grandſon would inherit by regular diſcent in fee tail *general*; but here the entail was to a *ſpecial* heir, and the grandſon did not convey the diſcent to himſelf in the ſpecial manner required, as he claimed through his mother, who could not be heir under a limitation to *heirs male* (*d*). A gift to a man and his

Tenant in tail after poſſibility, &c.

(*a*) 21 Ed. III. 43. (*b*) 35 Aſſ. 14. 37 Aſſ. 15. (*c*) 17 Ed. III. 78. b. (*d*) 18 Ed. III. 46. a.

heirs

heirs male, without ſaying of his body, was adjudged in parliament a fee-ſimple. Where land was given to a man and his wife in ſpecial tail, and either of them died without iſſue; the ſurvivor was by law to hold it for life, and was termed *tenant in tail after poſſibility of iſſue extinct:* and as he once had an eſtate of inheritance, he was not to be impeached of waſte done in his or her time *(a)*.

One of the rules which had been eſtabliſhed reſpecting remainders, was, that they ſhould take effect immediately upon the failure of the preceding eſtate, or otherwiſe they ſhould be void. Thus, where there were a brother and ſiſter, and land was given to *A.* for life, remainder to the right heirs of the brother, and he died; after which the tenant for life died, and the ſiſter entered; there, though the wife of the brother was afterwards delivered of a poſthumous ſon, it was held, that the ſiſter ſhould retain the land; and it was ſaid, that whereſoever a remainder or purchaſe veſts, there it ſhould remain; but it would be otherwiſe of a diſcent in the like caſe. Again; where there was tenant for life, remainder to the right heirs of *I.* and *N.* *I.* had iſſue, and died; then the tenant for life died, and the heir of *I.* entered; after which *N.* died: here it was, conformably with the above caſe, determined, that the heir of *N.* took nothing; for he was not heir to *N.* at the time the remainder fell, for *nemo eſt hæres viventis:* and it was ſaid, that where there was tenant for life, remainder to the right heirs of *I.* the remainder was in abeyance during the life of *I.*; and if he ſurvived the tenant for life, the remainder became void, becauſe there was no perſon *in eſſe* to take it when it fell *(b)*.

Another rule of remainders was, that they took effect at the ſame time when the firſt eſtate was created, and their continuance depended upon the continuance of that, all ſtanding or falling together. As where lands were given for life, with condition to perform certain duties, remainder over, with the ſame conditions; if the heir entered on the tenant for life for breach of the condition, the remainder was likewiſe defeated *(c)*.

Many of the remainders litigated in this reign are to be explained upon one or other of theſe rules. Thus, where there was tenant for life, remainder over, if the tenant for life died, and he in remainder agreed to the limitation, he ſtood in the place of the tenant for life; the particular tenant and remainder-man making but one degree in a writ of entry. If a termor or guar-

(*a*) Old Ten. (*b*) 30 Aſſ. 47. Bro. Don. & Rem. 21. (*c*) 29 Aſſ. 17.

dian leaſed for life, remainder over, and he in remainder agreed, he was equally a diſſeiſor with the tenant for life; it being, in law, all one eſtate (*a*).

THE giving an eſtate to a man for life, with remainder to his right heirs, was a ſpecies of limitation invented ſince the time of Bracton, and probably ſince the ſtatute *de donis* gave a temptation and an authority for making ſtrict ſettlements. The object of this new mode of conveyance, no doubt, was to give the heir a title by purchaſe, inſtead of one by diſcent, which was clogged with the heavy appendages of wardſhip, relief, marriage, and the like. But the court gave a conſtruction to ſuch gifts that wholly defeated the deſign of the makers. Where a gift was made to a man for life, remainder to another for life, remainder in fee to the right heirs of the firſt taker; it was there held, that the firſt tenant for life might, by virtue of the limitation to his heirs, either give or forfeit the fee-ſimple, although it did not properly reſt in him during the meſne remainder (*b*). And where an eſtate was given for life to a father, remainder to the firſt ſon and his wife in tail, remainder to the right heirs of the father; the father died, and then the eldeſt ſon and his wife died without iſſue; the lord was permitted to avow upon the younger ſon for the relief, as heir of his elder brother to the remainder in fee; though the younger ſon contended he came in as purchaſer, under the words of *right heirs of his father*, and that the tail and the fee could not be *ſimul & ſemel* in his elder brother (*c*).

Wills of land.

WE have ſuppoſed the above ſettlements to have been made by ſome common-law conveyance in the donor's life-time; that is, by fine, by feoffment, or ſome other grant with livery of ſeiſin; or ſuch a conveyance as countervailed a feoffment, as a leaſe for life, or for years, with a releaſe (*d*). Theſe were the only methods for a voluntary transfer of freehold, by the general law of the kingdom. But there prevailed in certain places a cuſtom, by which the inhabitants enjoyed the privilege of deviſing their lands by *teſtament*. The exiſtence of ſuch cuſtoms has been teſtified by Glanville and Bracton; but the particular influence of them, and the form of ſuch wills, are wholly unnoticed by thoſe writers; ſo that till the reign of this king there is little or nothing to be met with in any law-book upon the ſubject of deviſes of land; what hints are to be found in Bracton and Glanville relating rather to the nature of wills in general; which too, being an object of clerical judicature, were hardly thought a part of their ſubject (*e*). We

(*a*) 50 Ed. III. 21. (*b*) 24 Ed. III. 70. (*c*) 40 Ed. III. 9. (*d*) 44 Ed. III. 3. 31 Aſſ. 25. (*e*) Part I. 225.

now

now find many adjudged caſes upon wills of lands; and ſome of thoſe rules were laid down, which have governed ſince, when deviſes became the general law.

If lands were deviſable, it was moſtly in boroughs; and the courſe by which the deviſee was put in poſſeſſion varied: in ſome, it was the duty of the bailiff of the place to give him ſeiſin; in others, and that the moſt common, there lay a writ called *ex gravi querelâ*, which was to be executed by the officer of the town for that purpoſe *(a)*. It was held for ſettled law, that a huſband might give land to his wife by laſt will *(b)*, though he could not by deed; but a wife was not allowed to make a will of lands to her huſband, as it would be conſtrued to be the act of the huſband, or at leaſt to be by his coercion: though it was allowed that ſhe might, by the aſſent of her huſband, deviſe the moiety of her huſband's *goods*, and make executors, who ſhould prove the will by the huſband's aſſent; which agrees with what was the law in Bracton's time *(c)*. If the huſband, after her death, would prohibit the proving of the will, he might, and the will would be void *(d)*. So ſtood the law, as to the wills of *femes covert*. It was no uncommon thing to deviſe land to executors to make diſtribution for the good of the teſtator's ſoul; in which caſe, ſhould the executors refuſe or neglect to do it, and take the profits to their own uſe, the heir might enter, and have an aſſiſe *(e)*. It was held, that, ſhould one executor die, the reſt might lawfully ſell *(f)*. There ſeems to have been a difference between a deviſe of land *to* executors to ſell, and a deviſe of land to be ſold *by* executors: in the latter caſe, they were conſidered as having no poſſeſſion *(g)*, but only an authority.

There ſeems to have been an inclination to keep a gift of land by will within ſome of the ſtrictneſs with which gifts by deed were conſtrued. Where a man gave his land by will, and it was alledged that he afterwards ſold it, and took it back in fee to defeat his will, this ſeems to have been conſidered as a revocation; upon the idea, we may ſuppoſe, that the fee he died ſeiſed of was conſidered as a new purchaſe ſince the will was made, and therefore ſuch as could not be conveyed by an inſtrument made before *(h)*. Again, it was held, that where land was deviſed without any expreſs mention of the eſtate, the deviſee could properly have it only for life; ſo that, in this reſpect, a deviſe and a livery agreed: however, it was at the ſame time admitted, that a deviſe

(*a*) 39 Aſſ. 6. (*b*) 44 Ed. III. 33. (*c*) Part I. 225. (*d*) Bro. Deviſe 34.
(*e*) 38 Aſſ. p. 3. (*f*) 39 Aſſ. 17. 49 Ed. III. 36. (*g*) Bro. Deviſe 46.
(*h*) 44 Ed. III. 33.

to

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to a man *in perpetuum*, or to a man *and his aſſigns*, would convey a fee-ſimple *(a)*.

THE courts, however, began to make allowances in the conſtruction of wills which were never indulged to deeds; and it became a rule, that the intention of the deviſor was to be ſought out by all poſſible inveſtigation, and obſerved with ſtrictneſs, however untechnically it might be expreſſed. Thus, where a remainder was limited by will *propinquioribus hæredibus de ſanguine puerorum* of the deviſor, it was held, that, upon the deviſor dying, leaving two ſons who died without iſſue, and a daughter who had iſſue Iſabel, and then died, that *Iſabel* ſhould take, and was ſufficiently deſcribed by the will *(b)*.

Of warrants with aſſets.

WE have ſeen, in the laſt reign, that the warranty of tenant in tail, with aſſets in fee-ſimple deſcending upon the iſſue, was held a bar to his claiming any thing under the entail. We now find the courts expreſly declaring *(c)*, that this was admitted to be a bar, upon the equity of the ſtatute of Gloceſter, which ordained that the iſſue ſhould not be barred by the act of their father to demand the ſeiſin of the mother, unleſs they had value in recompence by diſcent from the father. But the courts were more ſtrict in requiring a *bonâ fide* recompence to the iſſue of tenant in tail, than to the heir of tenant by the curteſy. For if the iſſue had aſſets by diſcent, and aliened thoſe aſſets in fee, and died; then, though he had aſſets, and ſo was barred, yet his iſſue, or, if he had none, his younger brother, would not be barred; every heir in tail being conſidered as privy to the recovery of the land in tail, unleſs he had had recompence by diſcent in fee-ſimple. On the other hand, if a tenant by the curteſy aliened, and value in fee-ſimple deſcended to his iſſue, it was a good bar, though the iſſue ſhould afterwards alien the fee-ſimple, and die leaving iſſue; it being a rule, that, as his father was once barred, he ſhould have no title to demand any thing of his mother's ſeiſin *(d)*. As warranty did in itſelf imply a recompence, the law took care that ſuch recompence ſhould really continue; and ſuch great force was allowed to a warranty ſo circumſtanced, that it was held ſufficient not only to bar the iſſue, but the reverſion, even if in the king *(e)*. But aſſets without a warranty were of no more effect than a warranty without aſſets *(f)*.

WHEN aſſets were conſidered ſo neceſſary a requiſite to give effect to the warranty of the perſon aliening an eſtate in prejudice of his iſſue, it was

(*a*) 22 Ed. III. 16. (*b*) 30 Aſſ. 47. (*c*) Vide Ant. 24. (*d*) O. N. B. 143. b. 144. a. (*e*) 46 Ed. III. 28. 45 Aſſ. 6. (*f*) 38 Ed. III. 23.

merely

Of barring entails.

merely in compliance with the rule which had been adopted from the ſtatute of Gloceſter; the warranty being of itſelf ſufficient, at common law, to bar the iſſue from making any claim againſt it; and the ſtatute *de donis*, which had forbid the alienation of the tenant, had not forbid his warranty. And ſo it was held in another inſtance of warranty; for if the uncle, or other anceſtor, or couſin *collateral*, who was not privy to the entail, aliened with warranty, or made a releaſe with warranty, and died without heirs of his body, ſo that the *next iſſue in tail* was become his right heir, ſuch iſſue would be barred by his anceſtor's deed with warranty *(a)*. As for inſtance, where there was tenant in tail, the remainder to *E.* in tail, the remainder to *C.* in tail, and the firſt tenant in tail died without iſſue; *E.* in the firſt remainder made a feoffment with warranty, and had iſſue, and died, and then the iſſue died without iſſue; ſo that *C.* in the ſecond remainder became heir to *E.*: here, though the iſſue of *E.* were not barred, becauſe they had no aſſets by diſcent, yet *C.* was held to be barred by the warranty *(b)*. The ſame if an uncle of tenant in tail releaſed with warranty to an alienee of the tenant, this would bar the iſſue from claiming, though the uncle never had poſſeſſion or right in the land. Thus an eſtate tail might be barred by the warranty of an anceſtor under whom the eſtate *was* claimed, if accompanied with aſſets; and by the warranty of an anceſtor under whom the eſtate was *not* claimed, without any aſſets; which firſt warranty has ſince been called *lineal*, and the latter *collateral*, becauſe collateral to the title by which the eſtate was claimed: and theſe were treated as bars to which an eſtate was ſubject in its very creation, and were unaffected by the prohibition of the ſtatute *de donis*. When all this efficacy was attributed to a warranty, it was convenient that it ſhould not be miſapplied ſo as to protect wrong-doers, and to defeat the injured from purſuing their rights. If therefore a guardian or tenant at will aliened the land of the heir, or the leſſor, with warranty, it was a diſſeiſin, and ſuch warranty was void as againſt the heir or leſſor *(c)*. This was afterwards called *warranty commencing by diſſeiſin*.

The alienation of tenant in tail being ſomewhat opened by the above means, and the remaining reſtraint being perhaps ſtill more felt than ever, application was made to parliament more than once, for the aſſiſtance of a ſtatute to adjuſt the difficulties complained of. In the 17th year of the king, the commons petitioned, that the ſtatute of Weſtminſter might be declared,

(a) O. N. B. 143. b. 144. *(b)* Bro. Garr. 8. *(c)* 43 Ed. III. 7.

as

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as to the caſes in which the iſſue in tail might lawfully alien (*a*); but this was denied, by referring the petitioners to the law as it then ſtood. In the 50th year, there is a petition of the commons upon the ſubject of collateral warranty; which, however, makes no mention of its effect on an eſtate tail, but mentions the common caſe of a warranty, as it regarded eſtates in fee ſimple. The petition ſtates the law long to have been, *and with good ſenſe and reaſon*, that where any one was diſſeiſed of his freehold, and a collateral anceſtor of the diſſeiſee releaſed to the diſſeiſor, then being in poſſeſſion, with a clauſe of warranty; the diſſeiſee, ſhould the warranty deſcend on him, would be for ever barred of his right. And, ſays the petition, in many other caſes *not here named*, the warranty of a collateral anceſtor is conſidered as a bar, though nothing deſcend from the anceſtor; which was a great damage and diſheriſon of many. It was therefore prayed, that no ſuch warranty thenceforward to be made ſhould be a bar in any action, unleſs tenements to the value had deſcended on the demandant from ſuch anceſtor, according as it had been ordained by the ſtatute of Gloceſter (*b*). But this application not ſucceeding, collateral warranty continued as effectual as before.

The idea of recompence and value to the iſſue was the prevailing principle by which entails were governed and modified. In the 46th of this king, where a man had given land and rents in tail, with permiſſion that the donee might alien for the benefit of the iſſue, it was ſaid, that the donor might as well give an eſtate tail under conditions, as make a ſimple gift in tail (*c*). An alienation after a gift circumſtanced like this, ſo far from a violation of the ſtatute, ſeemed to be in the very ſpirit of it; for the will of the giver expreſſed in the deed of gift was ſtrictly adhered to. But in the following caſe, where the alienation had no authority but the tenant's own act, and the reaſons he could give in juſtification of it, the deciſion depended wholly on the efficacy then attributed to a recompence, or at leaſt a ſpecies of benefit and advantage to the iſſue. This is the caſe of *Octavian Lumbard*. A younger brother, in the abſence of the elder abroad, entered on the lands entailed, enjoyed them for ſome years, and then died ſeiſed, leaving iſſue; after this the elder brother returned, and raiſing a debate about his title, he and the tenant in poſſeſſion came to a compromiſe; namely, the elder brother releaſed his title, in conſideration of which the iſſue of the younger granted him a rent out of the land, with a power of diſtreſs. It

(*a*) Parl. Rot. 17 Ed. III. 47. (*b*) Rot. Parl. 50 Ed. III. 77. Note, this is No. 68 in Cotton. (*c*) 46 Ed. III. 4. b.

was

was held, that this rent charge ſhould be levied againſt the iſſue in tail, and ſhould continue, into whatever hands the land ſhould come (*a*). Thus was the quieting of the title conſidered as a ſufficient conſideration and value to the iſſue for the defalcation they ſuffered by the rent charge, though it was plainly a breach of the donor's will, at leaſt of the interpretation which had been put on that part of the ſtatute which forbids alienation.

Of chattels.

THESE were the obſervations that occurred concerning the nature of real property. The learning of real property fills the reports of this reign, where very little is to be found on chattels and perſonal property. It may be ſufficient, out of that little, juſt to remark, that *chattels* were now divided into *real* and *perſonal*. Thus a term for years was called a chattel real; other moveables were chattels perſonal (*b*). Certain limited intereſts in real property, beſides terms for years, were called chattels; as the next avoidance of a living: a ſtatute merchant in a woman, as it went to the huſband, if ſhe married, was therefore ſaid to be only a chattel (*c*).

So much has been ſaid in the former chapter on the juriſdiction of courts, that nothing need be added; but we ſhall proceed to ſpeak of ſuch actions as were now in uſe, beginning with aſſiſes and real actions.

BEFORE any thing is ſaid of the alterations which the aſſiſe and other actions had undergone, it will be proper to premiſe ſome obſervations upon thoſe diſpoſſeſſions of freehold that were the ground of ſuch remedies. The old law by which aſſiſes and writs of entry were governed, was founded on principles that naturally and neceſſarily lead to the learning that began now to be inferred therefrom, and which had grown to conſiderable magnitude and curioſity in this reign.

IF a man was deprived of his freehold in a way that was termed a *diſſeiſin*, we have ſeen he might make an *entry* thereon; and if that failed of recovering the poſſeſſion, he might have an aſſiſe of novel diſſeiſin; and this *entry* was *congeable*, as they now called it, during the life of the diſſeiſee, unleſs the land deſcended from the diſſeiſor to his heir, and then the *deſcent* was ſaid to *toll* the *entry*, and the diſſeiſee was driven to a writ of entry: though this right of entry might be kept alive by an entry within a year and a day before the death of the diſſeiſor; or, if he was prevented by danger or menace from actual entry, by a *claim*; and in ſuch caſe he might have his aſſiſe even againſt the heir, notwithſtanding the diſ-

(*a*) 44 Ed. III. 21. b. (*b*) Old Ten. (*c*) 39 Ed. III. 37. 37. Aſſ. 11.

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cent. Another way in which a man might be deprived of his freehold, was, by what was called a *diſcontinuance:* in ſuch caſe, the party injured could never enter, and of courſe could not have a remedy by aſſiſe, but was obliged to reſort to his writ of entry. Thus, in order to decide whether an aſſiſe or a writ of entry was the proper remedy, it was often neceſſary to diſcuſs ſome or all of theſe queſtions; whether his *entry* was *congeable*; whether it was *toll'd by diſcent*; whether it had been kept on foot by *claim*, or, as it was in after-times called, *continual claim*; or whether it did not amount to a *diſcontinuance.* All theſe compoſed, as it were, new titles in the law, which, though deducible from principles before laid down, have not yet been particularly noticed, but now entered more or leſs into moſt queſtions that aroſe upon the doctrine of eſtates. After ſaying ſomething upon a *diſſeiſin*, which is the foundation of the reſt, we ſhall go on to treat of theſe articles more minutely.

THE very large ſenſe in which the term *diſſeiſin* was underſtood in the time of Bracton, might preclude the neceſſity of ſaying much to ſhew the large extent in which it was now received: the deciſions of this reign ſeemed to be only confirmations or explanations of that author's doctrine, and as ſuch they are worthy of notice.

IT appears from Bracton, that an incroachment upon or diſturbance to the free uſe of a man's freehold was a diſſeiſin (*a*). It was now held and decided, that to dig in a man's ground, to fiſh in his waters, to cut a tree (*b*), incloſing ſo as to prevent a man enjoying his common (*c*), a reſcous, or even replevin, or incloſure to prevent a diſtreſs for rent *ſervice*; and a detainer, reſcous, replevin, and incloſure, accompanied with a denial of a *rent charge*, or a menace to prevent making a diſtreſs in either caſe, were all diſſeiſins of the freehold (*d*). A command not to enter was held a diſſeiſin of the lawful owner (*e*). Again, conformably with the ſame caſes ſtated by Bracton, it was held, that if a termor leaſe for life, he and his leſſee were diſſeiſors; a guardian making a feoffment in fee, or deviſing, were diſſeiſors; and the feoffees were held, as in Bracton's time, diſſeiſors (*f*). Since his time the limitation of remainders had become more common; and it was now held, that where a guardian leaſed for life, the remainder in tail, the remainder-man was equally a diſſeiſor with the guardian: the ſame where a

(*a*) Part I. 235. (*b*) 11 Aſſ. 25. (*c*) 8 Aſſ. 18. (*d*) 21 Ed. III. 34. 49 Aſſ. 5. 3 Aſſ. 8. (*e*) 26 Aſſ. 17. (*f*) 50 Ed. III. 22.

tenant

tenant for years aliened in tail, remainder over; if the tenant in tail died without iſſue, and the remainder-man entered, he was a diſſeiſor, though this might be by ſtat. 2. Weſtm. c. 25. (*a*). Wherever a man was ſeiſed wrongfully (if the entry was not tolled), he was a diſſeiſor; as for inſtance, dower was aſſigned to a woman, with all the uſual forms of law; but it turning out that ſhe was not really married, ſhe was conſidered as a diſſeiſor (*b*). If an attorney made livery of ſeiſin not exactly in the way in which he was authorized by his warrant, it was a diſſeiſin to the feoffor; even where the warrant was to give a ſimple livery, and he made it upon condition (*c*). Entry under a void grant was held a diſſeiſin (*d*). A deviſee entering under a deviſe of an infant's land by a guardian, was conſidered as a diſſeiſor (*e*). All commanders and counſellors, and thoſe who agreed afterwards to a diſſeiſin, were diſſeiſors (*f*). When a man was diſſeiſed of his freehold, it was a proviſion of our law, conformable with the dictates of nature, that he ſhould be permitted to repoſſeſs himſelf of it by an actual entry therein; by doing which, he again became in legal ſeiſin, and the continuance of the wrongdoer amounted to a diſſeiſin, for which an aſſiſe would lie. This entry was ſufficiently performed by putting the foot upon the land (*g*). The time of making this entry, and of purſuing it with force ſo as to regain the poſſeſſion, was limited, in the time of Bracton, to the ſpace of a few days; unleſs the party was then out of the way upon a journey, or the like: and all through this reign, it ſeems to have been a rule, that an entry ſhould not be made on a perſon who was in by title, unleſs in very ſpecial caſes; and where the tenant was party to the fact, it ſeems to have been limited to a ſeiſin for a year and a day (*h*). However, after ſuch entry, the right of bringing the aſſiſe ſtill continued during the life of the perſon making the entry, which right is ſometimes meant when the right of entry is ſpoken of.

Of entry congeable.

THE following were caſes where ſuch a right of entry was permitted: If a tenant for life infeoffed the firſt remainder-man, who died without iſſue, then the ſecond remainder-man might enter (*i*). If the tenant for life, or tenant after poſſibility of iſſue extinct, aliened, the perſon in reverſion might enter (*k*). If tenant for life aliened in fee, and the remainder-man in tail died without entering, the next remainder-man in fee might

(*a*) 50 Ed. III. 22. Bro. Diſſ. 85. (*b*) 21 Ed. III. 45. (*c*) 12 Aſſ. 24. (*d*) 24 Ed. III. 32. (*e*) 28 Aſſ. 11. (*f*) 27 Aſſ. 31. 37 Aſſ. 8. Bro. Diſſ. 104. (*g*) 22 Ed. III. 15. (*h*) Bro. Ent. Cong. 85. (*i*) 41 Ed. III. 21. (*k*) 45 Ed. III. 21. 25.

enter (*a*). This right of entry would be taken away, if the land in queſtion paſſed by diſcent to the preſent poſſeſſor, the law allowing a preſumptive title to him, which was not to be defeated by an entry; unleſs the perſon who had the right of entry was an infant; and then he would not be foreclоſed of his entry, which would deſcend to his heir: the ſame, if the diſſeiſee was in priſon, or under thoſe diſabilities which the law in many caſes allowed as a ſufficient excuſe for neglect in purſuing legal remedies.

EVERY advantage which a man ſecured to himſelf by entry might be acquired by *claim*, if he was deterred from making his entry by a fear of death, or of maiming; and a claim made under ſuch circumſtances would give the ſame ſeiſin as an actual entry (*b*). In the 38th year an aſſiſe was brought by a perſon who had right by diſcent, at the death of the perſon laſt ſeiſed, where it appeared that his anceſtor was reſiding in the town where the land was, and by parol claimed the tenements among his neighbours, but durſt not approach the land for fear of death, or ſome bodily hurt (*c*): and many caſes of the ſame kind appear in this reign. The caſe juſt mentioned was adjudged to have the effect of continuing to the heir the right to bring an aſſiſe, inſtead of being driven to his writ of entry; ſo that the law in this point was altered ſince Bracton's time; for then the aſſiſe could not be proſecuted by the heir of the diſſeiſee, unleſs it had been actually commenced by the diſſeiſee, and they had gone ſo far as a view, or the ſwearing of the jurors (*d*); but he was driven to a writ of entry. A like *claim* would prevent the conſequence of a diſcent from the diſſeiſor to his heir; for it was decided, where there had been a claim, and debate raiſed againſt the ſeiſin of the perſon in poſſeſſion, and he died, and then the diſſeiſee died, and the heir of the diſſeiſee entered on the heir of the diſſeiſor, the entry was congeable, and the aſſiſe was the proper remedy (*e*).

Diſcontinuance

A DISCONTINUANCE was a diſſeiſin, and ſomething more; it was where a perſon aliened lands to which another had a right, but was prevented by ſuch alienation from making an entry; and ſo was driven to ſome of thoſe writs of entry that have been ſo often mentioned: As where an abbot aliened the lands belonging to his abbey, and died, his ſucceſſor could not enter, tho' he had a right, but was obliged to bring his writ of entry *ſine aſſenſu capituli*. Again, where a man aliened lands which he had *jure uxoris*, and died, the wife could not enter, but muſt bring her writ of entry *cui in vita*. So if tenant in tail infeoffed another, and died leaving iſſue, the iſſue could

(*a*) 43 Aſſ. 45. (*b*) 49 Ed. III. 34. (*c*) 38 Aſſ. 23. (*d*) Part I. 248. (*e*) 25 Aſſ. 12.

not

not enter, but muſt bring a *formedon*. All theſe were now called *diſcontinuances*. Tho' this efficacy was allowed to a feoffment when made by tenant in tail, on account of his being in poſſeſſion, and the force of a livery of ſeiſin, which carried a fee ſimple; yet a releaſe of a tenant in tail in poſſeſſion was held not to be a diſcontinuance, unleſs accompanied with a warranty (*a*); and a grant of a reverſion even with a warranty was adjudged not to be a diſcontinuance (*b*).

Remitter.

We cannot diſmiſs the ſubject of diſſeiſin and diſcontinuance, without ſaying ſomething upon another head of law, which was a very frequent conſequence of the two former. This is a *remitter*; the meaning of which was this, that where a man was in poſſeſſion of land by an elder and a latter title, the law conſtrued him to be in poſſeſſion under the firſt, and not under the laſt; ſo that he was ſaid to be *remitted* to his firſt eſtate, or, as it was ſometimes expreſſed, *en ſon primer eſtate*, *en ſon meliour droit*, *en ſon melior eſtate*, and the like (*c*). This conſtruction of law was with a deſign of maintaining the original ſettlement of eſtates, whenever broke in upon by the preſent poſſeſſor; and as this was moſtly attempted by tenants in tail, the law of remitter ſeemed to operate in aid, and in the ſpirit of the ſtatute *de donis*. Thus where baron and feme tenants in tail had iſſue a ſon, and diſcontinued their eſtate by fine, and took back an eſtate to themſelves and the heirs of the body of the baron *only*, they were adjudged to be remitted to their former eſtate (*d*). Again, where tenant in tail made a feoffment, and died, and the feoffee infeoffed the iſſue within age, it was held a remitter to the elder eſtate (*e*). And where there were remainders over, a remitter of the firſt taker was a remitter of all the following remainders, ſo as to take it out of thoſe on whom it had been entailed by the new ſettlement (*f*). If a diſſeiſor infeoffed the diſſeiſee and two others, the whole accrued to the diſſeiſee only, and that by remitter (*g*).

Thus have we given a ſketch of theſe new terms, though not wholly new doctrines, of *congeable entry*, *diſcent that tolls entry*, *diſcontinuance*, and *remitter*; all which were intimately connected with and dependent upon each other, and were afterwards worked up into a very complicated ſyſtem of learning; there being, perhaps, no queſtion in any branch of artificial knowledge more problematical than ſuch as aroſe upon entries, and diſcontinuances of eſtates.

(*a*) 24 Aſſ. 28. (*b*) 36 Aſſ. 8. (*c*) Ed. III. paſſim. (*d*) 44 Ed. III. 26. (*e*) 40 Ed. III. 43. (*f*) 41 Ed. III. 17. (*g*) 29 Aſſ. 26.

Having

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HAVING conſidered the nature of diſſeiſin, and the circumſtances attending it, we come to treat of the aſſiſe of novel diſſeiſin. Whatever difference there may appear between this proceeding in the preſent reign, and in the time of Henry III. when ſo much was ſaid upon it, it was more in *terms* than in reality; the ſubſtance and form being nearly the ſame as they were originally. The moſt ſtriking difference ſeems to be in the ſilence about *turning Aſſiſes into Juries*; a piece of practice that was ſo much diſcuſſed in the early ages of this proceeding. But as this diſtinction was occaſioned by the penalty of attaint, to which recognitors of aſſiſe were ſubject, but not jurors, it no longer was neceſſary to keep up this diſtinction, when the legiſlature had granted attaints againſt jurors in all pleas of land; therefore, though we heard no more of the modification thereby expreſſed, the thing was practiſed as often as the aſſiſe was put to inquire of any thing beſides the mere ſeiſin and diſſeiſin.

AN aſſiſe was now ſaid to be capable of being taken four ways; that is, firſt, in point of aſſiſe: ſecondly, out of the point of aſſiſe: thirdly, for damages: fourthly, at large. An aſſiſe *taken in the point of aſſiſe* was, when the recognitors tried the general iſſue, *nul tort, nul diſſeiſin.* An aſſiſe *out of the point of aſſiſe* was, where the tenant pleaded ſome ſpecial matter in bar, ſhewing why the aſſiſe ſhould not be taken; as a releaſe, or ſome foreign fact to be tried in another county. An aſſiſe taken for *damages* was, when ſuch ſpecial matter was found againſt the tenant, or he confeſſed the ouſter, then the aſſiſe were charged to inquire only of the damages. An aſſiſe *taken at large* was, when, notwithſtanding ſome deed or ſpecial matter pleaded, the title and all the circumſtances were ſent to be tried by the recognitors; all which ſeems very reconcileable with the account of taking aſſiſes given by Bracton.

THE taking an aſſiſe at large was conſidered as the moſt liberal mode of doing juſtice between the parties; it was breaking through the plea which was deſigned to ſtop the aſſiſe being taken, and it was throwing the merits of the queſtion, whether it depended upon a fact or a title, fairly before the recognitors. Whenever either the plaintiff or tenant were infants, and a deed or a fine was pleaded in bar, or any other matter that would in a common caſe have ſtopped the aſſiſe paſſing, it was the practice for the judge to direct the aſſiſe to be taken at large (*a*). Inſtances of this are numerous

(*a*) 8 Aſſ. 28. 10 Aſſ. 1. 28 Aſſ. 6. 11 Aſſ. 6.

all

all through the book of aſſiſes. An aſſiſe would be taken at large upon a defect in the pleadings; for as the direct point in this proceeding ought to go to the aſſiſe, if what was pleaded in order to prevent the aſſiſe, by throwing the queſtion upon another fact, failed in ſo doing, the reſult was, that the aſſiſe ſhould paſs. Thus it was laid down as a rule, that where a bar was pleaded, and the plaintiff in reply made out his own title without traverſing the bar, the tenant was not bound to rejoin to the title; the aſſiſe therefore would not be taken upon the title, but *at large*; and if the aſſiſe ſhould find the plaintiff ſeiſed by any other title than that he had ſtated, he would recover. The aſſiſe was only to anſwer upon the ſeiſin and diſſeiſin (*a*): Thus, where a tenant pleaded a releaſe, and the plaintiff in his reply made title ſince the releaſe, without traverſing the bar, there the aſſiſe was taken at large; namely, upon the ſeiſin and diſſeiſin, under any title whatſoever (*b*). It ſeems from theſe inſtances, that the taking an aſſiſe at large, was the ſame as taking it in the very point of aſſiſe; only the latter was upon a plea of the general iſſue, the former upon a defect in the pleading to iſſue after a bar. Another inſtance in which an aſſiſe would be taken at large was, if after pleading in bar the tenant made default (*c*).

The grand object of the tenant in an aſſiſe was, to plead ſuch matter in bar as would prevent the aſſiſe being taken; and to effect this, he was ſometimes under a neceſſity of ſuggeſting ſome pretended title, which being unfit for the judgment of the *lay gents*, muſt be determined upon by the court; and however it might turn out in the event, if it deferred the aſſiſe, it had anſwered the purpoſe for which alone it was deſigned. One way of effecting this was, by acknowledging in the plaintiff ſome *colour* of a title (but ſuch a one as could not be ſupported againſt the real one that reſided in the tenant); and then praying the judgment of the court, if the aſſiſe ought to inquire of a diſſeiſin, where no diſſeiſin poſſibly could be. This was ſaid to be *giving colour* to the plaintiff. This ſort of pleading will be better explained by an inſtance: A caſe happened where a prioreſs had granted a leaſe to a man and his wife for years; the wife died, and the huſband married again, when the prioreſs entered with conſent of the huſband, and gave ſeiſin to him and his wife for their two lives; then the huſband died, and the prioreſs entered; upon which an aſſiſe was brought by the woman. Now the prioreſs, in order to prevent the aſſiſe being taken, pleaded in bar the above matter, only ſtating, inſtead of the livery of ſeiſin to the huſband and wife for their lives, that they came to her and prayed her to en-

Of colour.

(*a*) 28 Aſſ. 17. (*b*) Ibid. (*c*) 22 Ed. III. 4.

large

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large their eſtate; and ſo ſhe granted them a *confirmation* for their two lives; and that upon the death of the huſband ſhe ouſted the wife, as ſhe by law might. It was argued upon this, that the plea was no bar, becauſe it *acknowledged* no manner of *colour* in the plaintiff, but a mere confirmation, at a time when the plaintiff had no eſtate upon which it could enure: beſides, ſhe was a feme covert at the time, and ſo upon the whole the confirmation was void: it was therefore, they ſaid, only a plea to the aſſiſe, and they prayed the aſſiſe might be taken; meaning, that it contained no matter of law, but was a mere denial of the diſſeiſin. But it was anſwered, that this was a *colour* in the plaintiff; for it had been adjudged a good bar to ſay, that a woman entered after the death of her huſband, and claimed dower: for though it was neceſſary that dower ſhould be formally aſſigned, yet as ſhe had *colour* to claim it, it was reckoned a good bar. It was accordingly ſo adjudged, and the plaintiff was put to reply, and then he ſtated the truth of the caſe as above related (*a*).

THE point to be conſidered in theſe pleas was, whether they were a good bar; that is, whether they contained ſuch matter as ſhould not be truſted to the conſideration of unlettered jurors. Too ſcrupulous an attention to men's rights, and a jealouſy of the interference of juries in matters of law, induced the courts to entertain all ſuch pleas that upon the face of them purported to be pregnant with good matter in law; the truth of ſuch ſuggeſtion remaining to be ſifted by the replies and rejoinders that were to follow. The action of treſpaſs, which in many other reſpects bore an affinity with, and of late had become in many caſes a ſubſtitute for, the aſſiſe, did, in this particular alſo, reſemble it; and *colourable pleading* was as common and as expedient in treſpaſs as in aſſiſe. The following is a caſe in treſpaſs, where this ſort of pleading was reſorted to: In treſpaſs for taking and carrying away the plaintiff's corn, the defendant pleaded, that he let the land where the treſpaſs was ſuppoſed to be committed, to one *John*, for life; which John died, and the defendant entered; after which came the plaintiff and ſowed the ground, and then the defendant cut the corn; he therefore prayed the judgment of the court, if he ought to anſwer for this as a treſpaſſor. It was ſaid by the other ſide, that this amounted to ſaying, that he did not carry away the plaintiff's corn, and he offered to join iſſue thereon; but the defendant's counſel ſaid, they had *acknowledged* (that is, given colour) that

(*a*) 40 Ed. III. 23, 24.

he

he ſowed in the defendant's land, and that the defendant cut it, as he well might, and that if he pleaſed he might have had an aſſiſe. The plaintiff's counſel, maintaining the firſt objection, ſaid, if it was not growing on our land, then it was not our corn, and therefore it amounted only to a denial of carrying away the plaintiff's corn. But one of the juſtices ſaid, that it was a good plea in bar to ſay, that it was the defendant's freehold, without more; and he has ſaid more, namely, that the plaintiff ſowed the land; therefore, if he has any ſpecial matter, it would be more reaſonable to ſhew it in a reply, than to ſend it upon the general iſſue to the *lay gents*, who have no knowledge of law; ſo that the plaintiff was obliged to reply *(a)*. Theſe are ſome examples of pleading with *colour*, which began now to be practiſed, but was not yet ſo thoroughly explained upon principle as in after-times, when it was wrought into a very curious piece of learning.

Assises were to be taken in the county where the land lay, as ordained by *Magna Charta*. If at the aſſiſes a foreign matter was pleaded, triable in another county, the way was to remove or adjourn the aſſiſe into the common pleas, and from thence a *venire* was iſſued into the proper county; and then a *niſi prius*; upon the return of which, with the iſſue tried, if it was found for the plaintiff, it would perhaps be remanded into the firſt county, for the aſſiſe to find the damages, and for judgment to be there given: if there was nothing in the caſe but the foreign matter, then it was uſual for the juſtices of the common pleas to give final judgment. It was no uncommon thing, after the plea in bar was tried, whether in that or in a foreign county, for the aſſiſe to be put to enquire of the circumſtances. If the lands lay in Middleſex, then, as there were no juſtices of aſſiſe in that county, the aſſiſe might be brought in the king's bench. Together with the writ of aſſiſe, it was uſual for the plaintiff to have a *patent* of aſſiſe; this being neceſſary to entitle him to have a trial before the juſtices of aſſiſe; and if he had it not, the tenant might have judgment *(b)*.

Besides the aſſiſe of freehold, that *de communiâ paſturæ*, with the writ of admeaſurement, and *de ſecundâ oneratione paſturæ*, and the aſſiſe of nuiſance, were ſtill in practice. The aſſiſe of common had by ſome ſtatutes of the reign of Edward I. been rendered applicable to moſt caſes of diſturbance of common; and the writ of *quòd permittat* was on that account leſs reſorted to.

(a) 38 Ed. III. 28. *(b)* 29 Aſſ. 21.

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The writ of *quo jure* was alſo ſtill in being *(a)*. The proceſs in a *quòd permittat* was, as in treſpaſs, by attachment and diſtreſs; in *quo jure*, by ſummons, attachment, and diſtreſs *(b)*. The aſſiſe of nuiſance was, if brought in the county, called *de parvo nocumento*. What were the proper objects of ſuch vicontial writs was expreſſed in two quaint Latin verſes *(c)*.

THE doctrines of nuiſance and diſſeiſin ſtood now upon the ſame principle they did in Bracton's time; and the diſtinctions by which the injured perſon was to be governed in reſorting to one or the other was ſtill the ſame; only the concluſion from that diſtinction was now different; for inſtead of having his choice of the two, he was *confined* by the nature of his caſe to one only *(d)*. It was laid down, that where a perſon turned a courſe of water, ſo that his neighbour's mill could not work, an aſſiſe of diſſeiſin would lie, if the turning of the water and the mill were in the ſame vill; but if in different vills, then the remedy muſt be an aſſiſe of nuiſance in the vill where the *turning* happened *(e)*. If the place where the nuiſance was raiſed, appeared upon evidence to be the freehold of the plaintiff, he would be nonſuited, as having choſen a wrong remedy; this being a caſe where he ſhould have had aſſiſe of diſſeiſin or writ of treſpaſs *(f)*. The judgment in aſſiſe of nuiſance was to compel the party to remove it.

WE find in this reign a more particular mention of the *aſſiſe of freſh force*, a writ which had been glanced at in the reign of Edward I. *(g)* This lay where a man was diſſeiſed of tenements *deviſable*, as they were by cuſtom in the city of London, and ſome other boroughs and towns. The diſſeiſee was to lodge his plaint in the court of the franchiſe; when, upon ſhewing he was diſſeiſed, twelve men were appointed to try it, as in an aſſiſe of novel diſſeiſin. This was called *freſh force*, becauſe the entry of the plaint and the recovery thereon were to be within ſixty days, or the plaintiff would be barred of this remedy, and driven to an aſſiſe at common law. To quicken the execution of a judgment herein, the plaintiff might have a writ out of chancery to the bailiffs of the franchiſe *(h)*.

THE writ of *quare ejecit infra terminum* was *(i)* now always followed by the proceſs of ſummons, attachment, and diſtreſs; and an outlawry might be

(*a*) Part I. 251. 267. (*b*) O. N. B. 76. b. 79. b.

(*c*) *rica ca gultum ges es*
Fab fur porta, domus, vir gur mol murus, ovile,
Et *pons*, tradantur hæc vicecomitibus.

(*d*) Part I. 253. (*e*) 9 Aſſ. 19. (*f*) 32 Aſſ. 2. (*g*) Part I. 402. (*h*) O. N. B. 96. (*i*) Part I. 250.

had

had thereon; the real proceſs uſed in Bracton's time being now obſolete; and of courſe, inſtead of *præcipe*, it now always began with *ſi te fecerit ſecurum, &c.* But a writ of treſpaſs had lately been contrived for the redreſs of termors who had been ejected from their term, called *ejectione firmæ*. The words of this writ were: *Si A. te fecerit ſecurum, &c. oſtenſurus quare vi et armis in manerium de I. quod C. præfato A. demiſit ad terminum decem annorum, qui nondum præteriit, intravit, et bona et catalla ejuſdem A. ad valentiam, &c. in eodem manerio inventa cepit et aſportavit, et ipſum A. a firmâ ſuâ prædictâ ejecit, et alia enormia ei intulit, ad grave damnum ipſius A. et contra pacem noſtram, &c.* (*a*) This was a common writ of treſpaſs for entering land, and taking away goods, with the addition of certain words adopted from the *quare ejecit infra terminum*, namely, *quod demiſit ad terminum decem annorum qui nondum præteriit, &c. de firmâ ejecit, &c.* and the appellation of *ejectione firmæ* might be copied from the *ejectione cuſtodiæ*, which was likewiſe a writ of treſpaſs. This action lay not only againſt ſtrangers, but againſt the leſſor, notwithſtanding the old argument, that a man could not enter *vi et armis* in his own freehold (*b*); the poſſeſſion of a termor for years being now conſidered as equally ſacred with the ſeiſin of a freeholder, and to be protection even againſt the freeholder himſelf. However, this writ went only for damages, the term being to be recovered in the old writ of *quare ejecit*, or the ſtill older, of covenant.

De ejectione firmæ.

LITTLE need be ſaid of the writ of *mortaunceſtor*, except that it was leſs recurred to than in the time of Bracton; it being in many caſes ſupplied by the *formedon in diſcendre*, and other writs. The ſame may be ſaid of writs of *coſinage*, of *ael & beſael*; which being of ſimilar import with the mortaunceſtor, followed its fate in the revolution of legal remedies.

NEXT to the aſſiſe of novel diſſeiſin, the moſt common remedy in ouſters of freehold was the writ of entry. Theſe were various even in the time of Bracton; but ſtill being of a ſpecial form, and confined to certain circumſtances of freehold and eſtate, it had been found neceſſary in the reign of Henry III. and again in that of Edward I. to accommodate theſe writs to new caſes of injury to freeholds. Owing to theſe parliamentary enlargements, writs of entry had become very numerous and common. To bring into one point what has already been ſaid in different parts of the foregoing Hiſtory, and

Writs of entry.

(*a*) O. N. B. 122. (*b*) 44 Ed. III. 22.

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give the reader a juſt idea of the variety and comprehenſiveneſs of *real* remedies, it may be proper to recapitulate ſhortly theſe writs, with ſome curſory obſervations upon them, as they now ſtood.

THE writs of entry now in uſe were the following: that of *ad terminum qui præteriit—dum non fuit compos mentis—dum fuit infra ætatem—ſuper diſſeiſinam in le quo*, or *in le quibus—ſuper diſſeiſinam in le per cui & poſt—ſine aſſenſu capituli—ſur cui in vitâ—cui ante divortium—cauſâ matrimonii prælocuti*—of intruſion—*ad communem legem—in caſu proviſo—in conſimili caſu*. Of theſe there are only two that have not been mentioned before: theſe are, that of *cui ante divortium*, and *cauſâ matrimonii prælocuti*; and neither of theſe appear in our law books till this reign. The former of theſe ſtated, *quòd non habet ingreſſum niſi per prædictum C. quondam virum ipſius D. qui illud ei dimiſit, cui ipſa ante divortian inter eos celebratum contradicere non potuit:* it was in the nature of a *cui in vitâ*, and lay for the wife or her heir after a divorce *a vinculo matrimonii*. The latter was for a woman who had given lands, tenements or rents to a man on condition of his marrying her within a certain time; which man had diſabled himſelf by marrying another wife, or becoming prieſt: this condition ſhould be in writing, in order to maintain an action upon it. The writ ran thus; *Quòd idem B. ei dimiſit cauſâ matrimonii inter eos prælocuti, qui eam duxiſſe debuit in uxorem, et nondum duxit, &c. (a)* That in *le quo*, or *quibus*, is only another name for the firſt writ of entry ſtated in Bracton *(b)*.

To ſpeak ſhortly of the objects of theſe writs: That of *ad terminum qui nondum præteriit*, was for a leſſor, when his tenant for term of years, or for life, held over the term, or ſold it. That *dum non fuit compos mentis*, was when a perſon out of his mind ſold his lands or tenements, and died; in ſuch caſe his heir might have this writ. That *dum fuit infra ætatem* lay for an heir whoſe anceſtor ſold his land before he was of age. That *ſuper diſſeiſinam in le quibus* lay for the heir of the diſſeiſee (and no other), in whatſoever degree he was, againſt the diſſeiſor; this being of all the writs of entry neareſt to an aſſiſe of novel diſſeiſin, and is the firſt mentioned by Bracton, who fully explains it *(c)*. As the above writ *in le quibus* was contrived for caſes where the diſſeiſee did not ſue, that of *ſuper diſſeiſinam* in the *per, cui, & poſt*, was for caſes where ſome other than the diſſeiſor was tenant; as, where a man was diſſeiſed, and the diſſeiſor ſold to a ſtranger; or where the diſſeiſor died and his heir entered, and it lay either for the diſſeiſee or his heir; and according to theſe accidents the writ was in the *per*, or *cui*; or, if out of the degrees, then in the *poſt*; all which has been before very

(a) O. N. B. 137. (b) Part I. 248. (c) Ibid.

fully

fully explained (*a*). That *ſine aſſenſu capituli* lay for an abbot or prior whoſe predeceſſor had ſold lands in right of his church, without the aſſent of the convent. That *ſur cui in vitâ* was for a wife whoſe huſband, during the marriage, had aliened her freehold-lands. That *of intruſion* was for the reverſioner, where any one abated, after the death of tenant for life, in dower, or by the courteſy. That *of entry* AD COMMUNEM LEGEM, was for a reverſioner, when a tenant for life, in dower, or by the courteſy, made a feoffment in fee and died: this writ was given by 2 Weſtm. c. 3. That in *caſu proviſo* was for a reverſioner (during the life of a tenant in dower), where ſuch tenant in dower had made a feoffment in fee, in tail, or for the life of the leſſee: this was given by ſtat. Gloc. c. 7. And that *in conſimili caſu*, by equity of the ſame ſtatute of Glouceſter, was for a reverſioner during the life of the tenant for life or by the courteſy, if ſuch tenants made a feoffment in the above way (*b*). This brief review of the writs of entry now moſt commonly in uſe may be ſufficient to bring to the reader's mind what has been more fully ſtated in different paſſages, where it occurred to ſpeak of the firſt origin of theſe remedies, whether by common law or by ſtatute.

THE moſt common of all theſe writs, becauſe the moſt general in their effect, were thoſe *ſuper diſſeiſinam* in the *per*, *cui*, and *poſt*, particularly the latter; and ſo uſeful was it found to frame writs with theſe terms of enlargement, that it had become a rule, that other writs of entry as well as thoſe grounded upon a diſſeiſin, might be had in the *per*, *cui*, and *poſt*; ſo that the land demanded might be purſued into whatſoever hands it was ſhifted. They were very commonly calle dwrits of *Præcipe quòd reddat*, *&c.* and the ſame proceſs of ſummons, *grand & petit cape*, lay in all.

THERE was a writ in uſe for recovery of freehold, called *quod ei deforceat*, which was given by ſtat. 2 Weſtm. c. 2. (*c*) to tenants in tail, frankmarriage, dower, courteſy, or for term of life, when they had loſt by default: this came in the lieu of, and may be conſidered in the nature of, a writ of right, and could be brought only by the perſon who loſt the lands (*d*).

THE grand remedies for perſons claiming under entails were the *formedons*; thoſe *in diſcendre*, *in remainder*, and *reverter*. Theſe were firſt ſpoken of in the laſt reign, and very little need now be added, to explain the form and nature of them. A formedon *in diſcendre* was the only writ the iſſue could have, founded on the poſſeſſion of his anceſtor, tho' of his own poſſeſſion he

(*a*) Part I. 289. (*b*) O. N. B. 135 to 147. (*c*) Part I. 429. (*d*) O. N. B. 140. b.

might,

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might, like other freeholders, have an aſſiſe, or writ of entry *ſur diſſeiſin*, according to his caſe. It was now taken for ſettled law (*a*), that in this writ it was a good bar to plead the feoffment of the anceſtor with warranty, with an averment that the heir had aſſets by deſcent in fee-ſimple. If a tenant in tail in poſſeſſion entered into religion, his heir might have this writ, ſaying, *quòd pater ſuus habitum religionis aſſumpſit, &c.* But if the father made a feoffment before he took the habit of religion, the heir could not have this writ till his father was dead. In this writ, the taking of the profits was to be laid only in the perſon of the firſt donee, and the demandant was to make himſelf heir to the anceſtor laſt ſeiſed. Where a remainder was granted in tail, and he in remainder died ſeiſed, the iſſue could have no writ but a formedon *in diſcendre*; but if the remainder-man had never been ſeiſed, the iſſue could only have a formedon *in remainder*. In a formedon *in reverter*, the eſplees were to be laid in the perſons of the donor, and of the donee. The proceſs in theſe three writs was, ſummons, *grand* and *petit cape* (*b*).

The writ of right of dower, the writ of dower *unde nihil habet*, and of admeaſurement of dower, ſeem to be in the form, proceſs and learning, the ſame as has been already ſhewn (*c*). The former was to be directed to the heir (or his guardian, if he was in ward); but if the heir had no court, then to the chief lord; and it was removable the ſame as a writ of right patent, as will be more fully ſhewn hereafter. The writ of right of advowſon, and the aſſiſe of *darrein preſentment*, were much in the ſame condition as in Bracton's time (*d*). But the old writ of *quare non permittit*, was now called *quare impedit*; and the *quare impedit*, as it was uſed in Bracton's time, together with the appellation of *quare non permittit*, as a diſtinct writ, had long become obſolete (*e*). The other auxiliary writs in theſe clerical remedies, as uſed in the time of Bracton, were ſtill in force (*f*). A writ had been framed ſince his time, called *quare incumbravit*; and lay againſt the biſhop for filling the church, while a ſuit was depending for the preſentation. This writ was formed upon the model of the prohibitory writ mentioned by Bracton under the name of *ne incumbraret*. The proceſs in this new writ was ſummons, attachment, and diſtreſs (*g*). Another auxiliary writ had been contrived, and called, *de vi laicâ removendâ:* this was recurred to, when a debate was depending between two perſons for a church, and one of them came with great force and took poſſeſſion. The writ directed the ſheriff to remove

(*a*) Vid. ant. 24. (*b*) O. N. B. 152. 157. (*c*) Part I. 116. 279. (*d*) Part I. 254. (*e*) Ibid. 259. (*f*) Ibid. 261. (*g*) O. N. B. 33.

ſuch

ſuch force, and, if he was reſiſted, to take the *poſſe comitatûs*, and attach the offenders, ſo as to have their bodies *coram nobis* to anſwer for their offence. This writ was never granted without a certificate of ſuch reſiſtance from the biſhop *(a)*.

THE writ of *juris utrum*, which had been gradually opened by ſeveral ſtatutes, was ſtill further extended by the conſtruction of thoſe ſtatutes. The ſtatute 18th of this king, ch. 16. which allowed this writ, amongſt other perſons, to guardians or *wardens of chapels*, was held good for wardens of *hoſpitals*; ſuch a variation being juſtified (it was ſaid) by the ſtatute of Weſtminſter, as being *in conſimili caſu*. Thoſe who had a convent, or foundation with a common ſeal, could not maintain this writ, but ſuch perſons were obliged to reſort to the writ of entry *ſine aſſenſu capituli*, &c. *(b)* The proceſs in this writ was ſummons, and reſummons, as in a writ of *mortauncеſtor*.

NEXT, of writs of right. A writ of right was ſaid to be either *patent* or *cloſe*. A writ of right *patent* was that which was originally commenced in the court of the lord of whom the land in queſtion was holden, whether in that of an inferior lord, or of the king. This writ might be removed out of the lord's court into the county by *tolt*, and out of the county to the common bench by *pone*, if the demandant ſo pleaſed; for which reaſon the writ contained the clauſe of *et niſi feceris, vicecomes, &c. faciat, &c.*: for the writ being all along in the cuſtody of the demandant, he might remove the plea without putting the cauſe in the *pone*; though if the *pone* was at the ſuit of the tenant, it muſt contain the cauſe of removal. The plea might alſo be removed *per ſaltum* out of the lord's court to the common pleas, by *recordari* with cauſe, at the ſuit of the tenant *(c)*. How far this correſponds with the account before given of writs of right in the lord's court in the time of *Glanville* and *Bracton*, may be ſeen on comparing them *(d)*. The wording of the writ now in uſe agreed exactly with that in *Glanville*. Writs of right.

WE find a writ of right, intitled, *Quando dominus remiſit curiam ſuam domino regi*, which has not been before mentioned by that name, though it was the kind of writ which might have been reſorted to in Glanville's time, when a court was proved *de recto defeciſſe (e)*. This writ of right, *quia dominus remiſit curiam*, lay where lands or tenements, holden of ſome inferior lord, were demanded in a writ of right, and the lord held no court: in ſuch caſe he, at the requeſt of either of the parties to the writ, would tranſmit the writ to the king's court, *remitting his court*, for that time, *to the king's court*,

(*a*) O. N. B. 37. (*b*) O. N. B. 39. b. (*c*) O. N. B. fol. 2. (*d*) Part I. 136. 290. (*e*) Part I. 136.

with

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with a ſaving of his ſeignory on any future occaſion; upon which there iſſued this writ, *Quia dominus, &c.* returnable before the juſtices of the common pleas; and it was always *cloſe*. This writ agreed with the common form of a writ of right, only there was added after *teſte meipſo*, &c. a clauſe ſignifying the reaſon of iſſuing the writ, *quia capitalis dominus fœdi illius inde remiſit nobis curiam ſuam, &c.* The proceſs in this was ſummons, *grand cape* and *petit cape*, the ſame as in other writs of right (*a*).

THERE was a writ of right in London, directed to the mayor and ſheriff of the city, which was *patent*, and not *cloſe*; for though the cauſe of the diſtinction was, that the former were directed to the ſheriff, and the latter not, yet this being directed to the mayor as well as the ſheriff, was *patent*. This writ alſo did not contain the clauſe *niſi feceritis, vicecomes, faciat, &c.* and therefore it could not be removed like the others. However, it was removable in ſome particular caſes; as, where a foreigner happened to be vouched, the mayor and ſheriffs were to adjourn to a certain day before the juſtices of the bench, and ſend the record, which, when the warranty was determined, was to be returned by a judicial writ, commanding the mayor and ſheriffs to proceed, the juſtices having no further authority (*b*). This courſe correſponded with that which was directed in the like caſe of foreign voucher in Bracton's time (*c*).

THE writ of right *de rationabili parte* is only hinted at by Bracton, and not mentioned by Glanville. This writ lay between privies in blood, as between brothers, ſiſters, nephews, or nieces, and never between ſtrangers: and it lay even though the anceſtor had made a leaſe for the life of the leſſee, and ſo died not ſeiſed, leaving coheirs; in which caſe, ſhould any of the coheirs intrude after the death of the leſſee, the others might have this writ. This writ did not lie between relations paſt the third degree; it lay between brothers and ſiſters, where one claimed by charter, and the others by diſcent; for it was principally contrived for trying the privity of blood. It was a writ of right patent, directed to the lord of whom the land was holden, with proceſs of ſummons, and grand diſtreſs; but it did not admit the duel, or grand aſſiſe. The words of this writ were, *Plenum rectum teneas, &c. de uno meſſuagio, &c. quod clamat eſſe rationabilem partem ſuam, quæ tum contingit de libero tenemento, quod fuit* N. *patris ſui, &c. quod ei deforceat, &c.*

THE writ of right *ſecundum conſuetudinem manerii*, was a writ cloſe. This was confined to the court of antient demeſne; and every writ ſued upon the

(*a*) O. N. B. 18. (*b*) O. N. B. 4. (*c*) Part I. 291.

cuſtom

cuſtom of a manor was called a writ of right cloſe. In the form of it, it agreed exactly with the writ of right patent, having the additional words above-mentioned, *Præcipimus, &c. quòd ſine delatione, et ſecundum conſuetudinem manerii noſtri, &c. plenum rectum, &c.* but this writ could not be removed by the demandant into the county and common pleas, like the other. Yet, if he complained that right was not done, he might have a writ out of chancery to the ſheriff, commanding him to go in perſon with four knights to the county, and ſee that right was done. There were other helps in caſe of failure of juſtice (*a*). The writ of right, of *præcipe in capite*, which was for the king's own tenants, was a writ cloſe, and agrees with the old proceedings thereon ſo fully related by Glanville.

Besides the above, there were ſeveral others which were conſidered as writs of right, merely becauſe they were taken by reaſon of a ſeignory; as writs of eſcheat, *droit ſur diſclaimer*, *meſne*, *ceſſavit*, and *droit de garde* (*b*); as likewiſe the writ *de conſuetudinibus et ſervitiis*, *de ſecta ad molindenum*, *quod permittat in le debet*, *quo jure*, and others. In ſome of theſe the grand aſſiſe and duel lay; in ſome they did not, but the iſſue was to be tried by a common jury. And even in thoſe writs where the duel and great aſſiſe might be had, yet, if the demandant counted of his own ſeiſin, it would be tried by a jury, as was the practice in the time of Bracton.

Thus have we gone through thoſe writs that were of more frequent uſe; there remain ſeveral others that were reſorted to for the recovery of land, or other heritable rights, and which we ſhall now enumerate as they occur, without attempting to arrange them in any particular order.

The writ *de rationabilibus diviſis*, mentioned by Glanville (*c*), for ſettling boundaries was ſtill in uſe: the proceſs in it was ſummons, *grand* and *petit cape* (*d*). Another writ had been introduced that was applicable to the ſame occaſion, called, *de perambulatione faciendâ*, in which there was no proceſs; but the ſheriff was to go to the place where the incroachment had been made; and there, in preſence of the parties and chief men dwelling in the neighbourhood, he was to make perambulation, and mark the boundaries of ſeignories, as they had been in former times. This was an amicable proceeding, and the writ was always obtained by agreement of the parties; which agreement was to be entered into in the chancery, and there inrolled, before the writ granted (*e*).

(*a*) Part I. 13. (*b*) Ibid. 13. (*c*) Part I. 137. (*d*) O. N. B. 85. b. (*e*) O. N. B. 83.

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THERE was a writ contrived for perſons living in towns, where by cuſtom people might deviſe their lands: this was the writ *ex gravi querelâ*, of which there is no mention before this reign. If ſuch lands were deviſed, and the heir, or any other, entered thereon, the deviſee or his heir might have this writ againſt the intrudor, who was ſummoned before the mayor, or other principal officer of the town, to ſhew cauſe, at a certain day, wherefore execution ſhould not be done purſuant to the will; and if no cauſe was ſhewn, the deviſee was put into poſſeſſion (*a*). The writ of *nuper obiit* is only glanced at by Bracton, without any diſcourſe upon it. This was nearly allied to the writ *de rationabili parte*; it lay between privies in blood, as that did, and the wording of both is the ſame: the difference between them conſiſted in this; that the writ *de rationabili parte* was a writ *of right*, and lay though the anceſtor did not die ſeiſed; the preſent was a *poſſeſſory* remedy, and could not be ſupported unleſs the anceſtor had died ſeiſed of the land in queſtion. A *nuper obiit* was to be brought by all thoſe that were deforced, and not by one only: though ſome might not chuſe to ſue, yet all were to be named; and he who ſued might have a *ſummoneas ad ſequendum ſimul*; and if they did not comply after this, the perſon ſuing might have judgment and execution for his own portion ſingly: the proceſs in this writ was ſummons, *grand* and *petit cape*. As the writ of *mortauncеſtor*, *ael*, and *coſinage*, were always to be brought againſt ſtrangers, they differed in that reſpect from theſe two *family* writs (if they may be ſo called); for a *nuper obiit*, and *de rationabili parte*, always lay between privies in blood (*b*).

THE writs of *ceſſavit per biennium*, and of *ceſſavit per biennium de fœdi firmâ*, given by ſtatute in the reign of Edward I. were ſtill in uſe; of which the former was the more general and more common (*c*). There now appeared another writ of this kind, called *ceſſavit de cantariâ per biennium*. This was, when lands were given to a church, for ſome religious ſervice; as to pray for the donor's ſoul, to give alms, to perform divine ſervice, or the like. If this was intermitted for two years, and there was no diſtreſs on the ground, the donor's heir might have this writ againſt the *terre-tenant*. This, like the two former writs, made general mention of the ſtatute; *quæ ad præfatum R. reverti debet per formam ſtatuti de communi concilio regni proviſi*; and like the writs of entry before-mentioned, they might be in the *per*, *cui*, and *poſt* (*d*). Similar to the laſt of theſe writs, and grounded on the ſame ſtatute (*e*), was that *contra formam collationis*; which was, where an alienation was made by an abbot,

(*a*) O. N. B. 27. (*b*) Ibid. 130, (*c*) Part I. 434. (*d*) O. N. B. 140. (*e*) Part I. 404.

or

or other religious perſons, of lands left in pure alms, for divine purpoſes: this writ lay againſt the ſovereign of the religious ſociety, and not againſt the tenant of the land.

AFTER the regulations that had been made in the time of Edward I. about waſte, the remedies in ſuch caſes ſtood thus: There was a writ of waſte, grounded on 2 Weſtm. c. 22. (*a*); and this writ was for the reverſioner againſt tenants for life, in dower, by the courteſy, guardians in chivalry, or tenants for years: it had the proceſs of ſummons, attachment, and diſtreſs, and, on default, the proceeding directed by that act (*b*). Next to this was the writ of *eſtrepement*, given by the ſtatute of Gloceſter, ch. 13. (*c*) which was a ſort of prohibition to ſtop waſte, while a *præcipe quòd reddat*, &c. was depending for the lands. This writ, in term-time, was judicial, iſſuing out of the rolls of the principal cauſe; if out of term, it iſſued out of chancery: the proceſs was attachment and diſtreſs; and, for default of diſtreſs, proceſs of outlawry (*d*). The writs in uſe for recovery of ſervices, where the perſon or his anceſtor had not been ſeiſed within the limitation of an aſſiſe, was that *de conſuetudinibus et ſervitiis*, being a writ of right, in which might be had the duel and the great aſſiſe (*e*). Where a perſon was diſtrained for more ſervices than he was bound to by his original infeoffment, he might have the writ *contra formam feoffamenti*, given by the ſtat. of Marlb. ch. 9. (*f*). The other writ in caſes of ſervices was the writ of *meſne*, with the proceedings ſo fully ſtated in the reign of Edward I. (*g*) Next follow the *quid juris clamat*, and the *per quæ ſervitia*, and *quem redditum reddit*, to obtain an attornment of the tenant (*h*). The writ of right *ſur diſclaimer* was known in Bracton's time, but not by that or any particular name to diſtinguiſh it from others (*i*). This writ lay, when the lord had avowed, and the tenant *diſclaimed* to hold of him; upon which, there being an end of the ſuit in replevin, the lord was driven to this writ, and, if he made out his title, recovered the land: this was where the ſuit had been in the common-pleas; for if it was in the county, or court baron, where the proceeding was not of record, the lord would be in mercy, as in Bracton's time (*k*). There were other actions, beſides replevin, for recovery of ſervices, where the tenant might diſclaim; one of which was a *ceſſavit*: in all ſuch actions the lord muſt reſort to this ſpecial writ of right. The old writs of ward were ſtill the uſual remedies in ſuch caſes; namely, the writ *de communi cuſtodia*, *re-*

(*a*) Part I. 420. (*b*) O. N. B. 41. (*c*) Part I. 401. (*d*) O. N. B. 43. (*e*) Ibid. 86.
(*f*) Part I. 344. (*g*) Ibid. 432. (*h*) O. N. B. 171, 172. (*i*) Part I. 335. (*k*) O. N. B. 162.

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viſhment of ward, and *ejectment of ward*. All theſe have already been ſufficiently diſcourſed of (*a*). But there now appeared a new writ, called *de entruſion de garde*, which lay where the infant within age entered into the lands, and held the lord out (*b*). The writs *for the value of a marriage*, and *for forfeiture of marriage*, made up the remainder of the remedies contrived for guardians. The writ of *eſcheat* was ſtill the remedy for lords claiming under that title.

OTHER writs in uſe, but leſs frequently reſorted to than the former, were theſe: Firſt, the writ of *monſtraverunt*, which was for tenants in antient demeſne, when they were diſtrained for other ſervices and cuſtoms than they performed in the time of William the Conqueror (*c*). The writ of *ne injuſtè vexes*, which was for common tenants when they were diſtrained by their lords to do more ſervices and cuſtoms than they were wont to do. We find this writ in the time of Glanville (*d*): it was conſidered as a writ of right patent and anceſtral, and might be determined by the battel or grand aſſiſe: the proceſs in this and the *monſtraverunt* was one prohibition, one attachment, and then a diſtreſs (*e*). The writ *de contributione faciendâ* (*f*), and that *de partitione faciendâ*, for parceners who claimed land (*g*); that *de warrantiâ chartæ* (*h*); the writ of *diem clauſit extremum*, which had no proceſs, but was a writ of office (*i*). When a perſon had been found heir to the deceaſed by the laſt writ, he might, when he came of age, have the writ *de ætate probandâ* to prove that fact: this, like the former, being a writ of office, had no proceſs (*k*). The writ of *quo minus* was for a perſon who had a grant to take eſtovers every year out of another's wood, and was in the nature of a writ of waſte: the proceſs was attachment and diſtreſs (*l*). The writ of *ad quod dæmnum*, of which ſo much was ſaid in the reign of Edward I. was ſtill in uſe, as likewiſe the writ of *quo warranto* (*m*); the writ *de idemptitate nominis* (*n*), which has been mentioned before (*o*), as well as that *de libertate probandâ*, and *de nativo habendo* (*p*); next to which may be ranked the great writ for the protection of the perſons of men againſt illegal impriſonment, called *de homine replegiando* (*q*).

AMONG others was the old writ *de moderatâ miſericordiâ* for a perſon who had been amerced in a county court, or court baron, with great rigour, without due regard to the degree of the offence (*r*). The writ of *decies tantum*

(*a*) Part I. 432. (*b*) O. N. B. 100. (*c*) Ibid. 16. b. (*d*) Part I. 137. (*e*) O. N. B. 17. b. (*f*) Ibid. 114. (*g*) Ibid. 157. b. (*h*) Ibid. 161. b. (*i*) Ibid. 162. b. (*k*) Ibid. 163. b. (*l*) Ibid. 164. (*m*) Ibid. (*n*) Ibid. 166. (*o*) Vid. ant. 59. (*p*) O. N. B. 47. (*q*) Ibid. 46. (*r*) Ibid. 53.

was

was given by ſtat. 34 Ed. III. c. 3. and lay, where a jury had taken money of one of the parties for their verdict: they were by this writ to pay ten times as much as they had received; and if they had nothing to pay, they were to be impriſoned for a year. This writ lay alſo againſt embraceors and procurors of ſuch inqueſts (*a*). The writs in eccleſiaſtical matters were *prohibition indicavit*, and *conſultation*; and when a perſon was excommunicated, there lay a temporal proceſs againſt him by writ of *excommunicato capiendo*; and when he was to be delivered, that of *excommunicato deliberando* (*b*). The two writs of *diſceit* and *conſpiracy* were ſtill in uſe (*c*).

THE following were the writs relating to judgments, and execution thereof. The writ *de executione judicii* lay where the ſheriff or bailiff prolonged the execution of the judgment in favour of the tenant. The writ *de falſo judicio* was, where falſe judgment was given in the county, hundred, or court baron; and this writ was to bring the record before the juſtices in bank, or in eyre, which was the very account given of this writ in Glanville's time (*d*). The writ *of error* was, where falſe judgment was given in the common pleas: this writ was then returnable in the king's bench; but if falſe judgment was given in the king's bench, ſuch judgment was to be reverſed in parliament, or by the king's great council upon petition (*e*). The writ *de errore corrigendo* was a writ of error directed to the juſtices before whom the judgment was paſſed, commanding them to correct the error therein; and is what has been ſince called, *error coram vobis*, &c. (*f*) The writ of *auditâ querelâ*, like the former, was to take off the effect of a judgment; but this was to be upon the allegation of ſome fact that had taken place ſince, and intitled the party to avoid the judgment. It was commonly uſed, where, after a ſtatute-merchant, a compromiſe or releaſe of the debt had been made; then if execution was ſued, this writ might be had returnable in the common pleas (*g*). The writs of *dedimus poteſtatem* for making an attorney, and for levying a fine, have been mentioned before (*h*). The writ of *quale jus* was deviſed after the ſtat. 2 Weſtm. c. 32. to enforce the proviſions of that act. It was a judicial writ, which an abbot or other religious perſon, after recovery of land by default, was, before execution, to ſue to the eſchaetor, to enquire if he really had a title to the land, or it was loſt by colluſion (*i*).

PERHAPS the reader will be better ſatisfied with this ſhort catalogue of real writs, than if they had been treated fully and at length; but the following

(*a*) O. N. B. 131. b. (*b*) Ibid. 33. 35, 36, 37. 39. (*c*) Ibid. 56. 63. (*d*) Part I. 123. (*e*) Ibid. 18, 19, 20. (*f*) Ibid. 61. (*g*) Ibid. 74. (*h*) Ibid. 23. 114. (*i*) Ibid. 177.

deſerve

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deſerve more particular conſideration. Theſe are *perſonal* actions, moſt of which continue in uſe to this day; namely, the action of debt, detinue, account, replevin, treſpaſs, and treſpaſs upon the caſe. Firſt, of the action of debt.

Action of debt.

THE action of debt was the common remedy in moſt contracts for the recovery of money; and ſince it had obtained the proceſs of *capias*, by a ſtatute of this king, it become more efficacious and certain. The proceſs now was ſummons, attachment, and diſtreſs; and on default of diſtreſs, three *capias's* and an *exigent* proclaimed in five counties, and then to outlawry.

THE writ of debt was the ſame in form, as in the reign of Edward I. (*a*) We have now an opportunity of ſeeing the forms of ſome *declarations* in this action, which are furniſhed by a book of precedents collected in this reign: ſome ſpecimens of theſe may not be unacceptable to the curious. The formal beginnings of theſe declarations were the ſame as the beginning of petitions to parliament, *Ceo vouz monſtre l. R.* &c. and being of a date previous to ſtat. 36 Ed. III. they are in French. A literal tranſlation may ſerve as well for ſpecimens, as the original. *Ceo vous monſtre, &c. This ſheweth unto you,* A. *who is here, that* B. *who is there,* (*b*) *unjuſtly detains from him, and will not render him* 10l. *of money which he owes him; and therefore unjuſtly, becauſe at ſuch a day, year and place, the ſaid* B. *granted himſelf to be bound to the aforeſaid* A. *in* 10l. *to be paid at ſuch a day, year, and place; at which day the ſaid* A. *went to the aforeſaid* B. *and requeſted him to pay him the aforeſaid* 10l. *and he would not pay it, nor yet will,* à tort et à ſes damages *of* 100 *ſhillings; and if he denies it, he can bring* GOOD SUIT, &c.

THE declaration, or counting upon the writ of debt, was various, according to the ſpecial nature of the demand: the following are the ſubſtance of different declarations. Upon a *lending*, it may be thus: *Therefore unjuſtly, becauſe on ſuch a day, year, and place, the ſaid* A. LENT *to the ſaid* B. 10l. *to be paid on ſuch a day, at which day he did not pay it,* &c. Upon a *ſelling*, thus: *Was obligated to the ſaid* A. *in* 10l. *for a horſe,* or *for corn, namely,* &c. or *for a bag of corn,* &c. or *for ten quarters of corn, which he* SOLD *to him, to be paid on ſuch a day, at which day,* &c. and then go on as before. Again: *And therefore wrongfully, for that whereas the ſaid* A. *was bound to one Robert Fox in* 10l. *which the ſaid* A. BAILED *to the aforeſaid* B. *to pay to the aforeſaid Robert, the ſaid* 10l. *to the aforeſaid Robert he paid not; by reaſon of which the ſaid Robert the aforeſaid* 10l. *againſt the ſaid* A. *on ſuch a day, and year, and place, before ſuch juſtices did recover; for*

(*a*) Part I. 472. (*b*) *A tort.*

which

which reaſon the ſaid A. *hath often come to the aforeſaid* B. *and requeſted him to* REBAIL *the aforeſaid* 10l. *he has never been willing ſo to do, nor yet will,* A TORT, ET A DAMAGES, *&c.* Upon a *bailment* of money, thus: *And therefore wrongfully, for that whereas the ſaid* A. *by a writing obligatory, was bound to one Robert in* 10l. *which the ſaid* A. BAILED *to the aforeſaid* B. *to pay the aforeſaid Robert, ſo that he might be acquit of the aforeſaid* 10l. *the ſaid* B. *the ſaid* 10l. *to the aforeſaid Robert did not pay; by reaſon of which the ſaid Robert the aforeſaid* 10l. *ſuch a day, year, and place, before ſuch juſtices againſt the ſaid* A. *demanded; pending which plea, the ſaid* A. *came to the ſaid* B. *and requeſted him to acquit the ſaid* 10l. *and he would not acquit him; by reaſon of which the ſaid Robert the aforeſaid* 10l. *againſt the ſaid* A. *for default of acquittance of the ſaid* B. *did recover; by reaſon of which the ſaid* A. *requeſted that he would rebail to him the aforeſaid* 10l. &c. as above. Again, on a bailment of money: *And therefore wrongfully, for that whereas the ſaid* A. *on ſuch a day,* BAILED *to the ſaid Abbot, and one Robert a monk there,* 10l. *to keep till he demanded it of them; by reaſon of which the ſaid* A. *on ſuch a day, year, and place, demanded the aforeſaid* 10l. *and they would not pay them,* &c. For rent on a leaſe: *And therefore wrongfully, for that whereas the ſaid* A. *on ſuch a day,* &c. LEASED *to the aforeſaid* B. *one carve of land in* C. *for the term of ten years, the term commencing ſuch a day,* &c. *to pay* 10l. *per annum during ſuch term; of which the payment of the two firſt years amounting to* 20l. *is arrear; by reaſon of which the ſaid* A. *has frequently come to the aforeſaid* B. *and requeſted him to pay the aforeſaid* 20l. *which he has never been willing to do, nor yet will,* &c. Againſt a pledge, or collateral ſecurity, thus: *And therefore wrongfully, for that whereas the ſaid* A. *ſold to one Robert Fox ten quarters of corn for* 10l. *to be paid on ſuch a day,* &c. *for which the ſaid* B. *became his pledge; at which day the ſaid Robert did not pay any thing; for which reaſon the ſaid* A. *often came to the ſaid* B. *and requeſted him that he would pay him the ſaid* 10l. *yet he would not ſo do,* &c. Upon a conditional promiſe to pay: *And therefore wrongfully, for that whereas the aforeſaid* B. *granted to make a feoffment to the ſaid* A. *of one carve of land,* &c. *in* C. *on ſuch a day,* &c. *and if he did not, that he was bound to the aforeſaid* A. *in* 10l. *at which day he did not infeoff him; for which reaſon he requeſted him to pay him the aforeſaid* 10l. *yet he has not been willing,* &c. Upon the ſtat. Weſt. 2. c. 11. againſt a keeper of a priſon: (*a*) *And therefore wrongfully, for that whereas one Robert Fox on ſuch a day,* &c. *tendered accompt to the ſaid* A. *before* X. Y. Z. *auditors aſſigned by the ſaid* A. *to hear the accompt*

(*a*) Part I. 419.

of

of the ſaid Robert, of the time that he was bailiff of the manor of R. &c. Or thus: *Receivor of his money ariſing from ten tunnels of wine of the ſaid* A. *ſold by the ſaid Robert, for the profit of the ſaid* A. *at Oxford, and remained* 10l. *in arrear before the aforeſaid auditors; by reaſon of which, by the teſtimony of the auditors aforeſaid, the aforeſaid Robert was committed to the priſon of* B. *according to the form of the ſtatute of our lord the king in this matter provided; and there ſuch a day, year, and place,* &c. *and by the aforeſaid* B. *then keeper of the priſon aforeſaid, was received, and in the ſaid priſon detained from the aforeſaid day to ſuch a day, when the aforeſaid* B. *without the aſſent of the ſaid* A. *and without gree being made to the ſaid* A. *let the ſaid Robert go out of the aforeſaid priſon; by reaſon of which, according to the form of the aforeſaid ſtatute, an action hath accrued to the ſaid* A. *to demand the aforeſaid* 10l. *of the aforeſaid* B.; *and the ſaid* A. *hath often come to the ſaid* B. *and requeſted him to pay the aforeſaid* 10l. *and he was not willing ſo to do,* &c. *(a)* Theſe may be ſufficient ſpecimens of the form in which narrations upon the writ (as they were then called) were conceived.

It next follows, that we ſhould take notice of ſuch deciſions as tended to reduce this action nearer towards the form in which it appeared in latter times. We have ſeen, in the laſt reign, that a deed made in a place not within the proceſs of the court could not be the ſubject of an action, as deeds made in Cheſter, Durham, Ireland, and other places beyond ſea *(b)*. As to Cheſter and Durham, the difficulty was probably now removed by ſtat. 9 Ed. III. ſt. 1. c. 4. and in other caſes they ſeem to have hit upon an expedient to avoid this objection. An obligation was made at *Harfleet in Normandy*, and the plaintiff counted upon it, as made at *Harfleet in Kent*; and tho' it was objected that there was no ſuch place in Kent, the point ſeems not to have been attended to. This bond concerned a retainer of men to ſerve in France, in the wars; and though it was argued, that this being for duties to be performed out of the kingdom in foreign parts, it ought to be tried before the *conſtable and marſhall* (a new juriſdiction, of which nothing was heard till this reign), it was held that the action would well lie in a court of common law. It was at the ſame time held, that where a demand was grounded on an obligation, you could not go for leſs than the whole ſum, unleſs ſatisfaction was confeſſed for the remainder *(c)*.

It was held, that an action of debt would lie for damages recovered in a real action; ſo that, ſhould the anceſtor die before execution, the heir might have execution of the land, and the executor of the damages *(d)*. Where money was given to a man to make a profit of it for the plaintiff (as in one of the declarations above ſtated) he might at his option have either an action

(*a*) Novæ Narr. fol. 37. b. to 39. b. (*b*) Vid. ant. 29. (*c*) 48 Ed. III. 2. (*d*) 43 Ed. III. 2.

of

of debt or account *(a)*. Where a perſon came to a creditor and engaged to him, that, ſhould his debtor not pay him, he would become his principal debtor, and pay him at ſuch a time, it was held that an action of debt would not lie, without a ſpecialty; for this was no diſcharge of the firſt debtor, tho' it would have been otherwiſe if the promiſe had been by deed *(b)*. If man committed felony, it was held he did not forfeit his debts without ſpecialty, tho' he did thoſe upon ſpecialty; for if the king brought an action for the former, the defendant would be deprived of his law wager by the prerogative, which the law would not ſuffer *(c)*. Such differences were made between ſpecialties and common debts. Where two were bound ſeverally in an obligation, two ſeveral *præcipes* were brought, and held good; and where the bond was accompanied with a condition, the defendant might aver the payment *at the day* without a ſpecialty; for tho' he could upon a ſingle bond compel the obligee to give an acquittance, he could not in caſe of a bond upon condition. But a plea of payment *after* the day, though the acceptance of the obligee was alledged, would not prevent the plaintiff from recovering *(d)*.

In debt for rent, if the leſſor's eſtate was determined by the entry of any one upon him, as of the diſſeiſee upon the diſſeiſor, the perſon who infeoffed upon condition, or the like, all this would be a good plea in bar of the action. If a man holding for years leaſed his whole term, he could not diſtrain, becauſe he had no reverſion; but he might have his action of debt for the rent *(e)*. If a leſſor entered, it would be a good plea to diſcharge the rent accruing ſince *(f)*. If a man leaſed for his own life, debt lay for his executors without a ſpecialty; in like manner, if for the life of the leſſee, it lay againſt the executors of the leſſee without ſpecialty *(g)*. A leaſe was made to two, by indenture, which one ſealed, but the other did not; yet the other was bound to pay the rent by the *occupation*, tho' he was not bound to the conditions of the leaſe *(h)*. It was held, an action of debt would lie for rent, notwithſtanding a right of re-entry was reſerved *(i)*; but if the plaintiff entered, it might be pleaded in bar of the action *(k)*. Where rent was reſerved in kind, the writ was brought in the *detinet* only, and not in the *debet*; and tho' it was urged that this, being a rent, ſhould be demanded as a debt, it was anſwered, that the chancery would never make a writ in the

(*a*) 42 Ed. III. 9. (*b*) 44 Ed. III. 21. (*c*) 49 Ed. III. 5. (*d*) 46 Ed. III. 29.
(*e*) 45 Ed. III. 8. (*f*) 45 Ed. III. 4. (*g*) 44 Ed. III. 42. (*h*) 38 Ed. III. 8.
(*i*) 38 Ed. III. 22. (*k*) 45 Ed. III. 4.

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debet, except it was for money, and the writ was accordingly adjudged to be good (*a*).

WHERE an action was brought againſt baron and feme for damages recovered againſt her *dum ſola*, the writ was *debent et detinent*; and tho' it was ſaid it ſhould be only in the *detinent*, it was held good. Again, where an action was brought by an abbot or prior, on an obligation to his predeceſſor, it was laid in the *debet et detinet*, tho' it would be different in the caſe of executors (*b*); yet where one executor ſold goods of the teſtator, he might have his writ alone, and as for a debt of his own (*c*). If a feme died, the baron was diſcharged from all her debts, and deprived alſo of all her credits *dum ſola* (*d*). Where money was paid for inſtructing a child in a certain trade within ſo many years, and the child died before the time expired, it was held, debt would not lie to recover the money; nor, if the money had not been paid, would the inſtructor have been intitled to an action (*e*). It was held, that where a man promiſed to give ſo much money to *I. S.* if he would take his daughter to wife, debt would lie; but if the money had been promiſed *in marriage*, it would not lie, on account of the word *marriage*, it being then become an object of ſpiritual cogniſance (*f*). If an heir pleaded falſely, he was to be charged in his own land, which he took by purchaſe, as well as in that he took by deſcent (*g*).

A DEFENDANT pleaded to an obligation, that he had performed the conditions upon which it had been made, and the plaintiff reſtored it to him, and afterwards took it with force and arms; and this was held a good plea (*h*). Again, in another action depending in the exchequer, the ſame was allowed a good plea in debt, tho' it was not in treſpaſs, where nothing but damages recovered could be a bar (*i*).

IT may be proper here to mention the writ *de plegiis acquietandis*, which was a common remedy for a ſurety againſt the principal debtor, after having paid the debt for which he was bound. This writ was in uſe in Glanville's time (*k*); and, though word for word the ſame, it then lay for the creditor againſt the ſurety. The preſent notion of ſuretyſhip was, as has juſt been obſerved, that ſuch a collateral engagement to pay, on default of the real debtor, was not good without writing; and therefore the writ *de plegiis acq.* could not be maintained againſt the original debtor without writing (*l*). The writ of *ſi recognoſcat* was ſtill in uſe.

(*a*) 50 Ed. III. 16. (*b*) 47 Ed. III. 23. (*c*) 38 Ed. III. 9. (*d*) 49 Ed. III. 25.
(*e*) 21 Ed. III. 12. (*f*) 22 Aſſ. 70. (*g*) 21 Ed. III. 9. (*h*) 43 Ed. III. 23.
(*i*) 43 Ed. III. 27. (*k*) Part I. 127. (*l*) 43 Ed. III. 11. 44 Ed. III. 21.

THE

THE action of *detinue* ſtill preſerved very ſtrongly its original affinity with the former: the wording of this writ was the ſame as in the reign of Edward I. (*a*) Reſpecting theſe two writs, when they were to be in the *debet*, and when in the *detinet*, we find the following rule: In a writ for chattels, they never ſaid *quæ ei debet*; nor in a writ of debt, if brought by an executor or by any other againſt an executor, whether it was a debt or a chattel, and in whatſoever court the writ was brought; for it was held, it ſhould always be *injuſtè detinet*. In other reſpects there was a difference between the practice in the common-pleas and before the juſtices itinerant; for in the former you might ſay *debet et detinet*, if they were not chattels, nor againſt or for executors or adminiſtrators, for then it ſhould be *detinet* only: in the latter, it was in debt to be *debet* only, and for chattels *detinet* (*b*).

THE following are ſome ſpecimens of declarations upon a writ in the *detinet*. Firſt, upon a *bailment*: *Ceo vous monſtre, &c. This ſheweth you* A. *that* B. *wrongfully* DETAINS *from him chattels to the value of* 20*l. and therefore wrongfully, for that whereas the ſaid* A. *on a certain day, year, and place,* BAILED *to the aforeſaid* B. *linen and woollen cloth to keep till he demanded it, the ſaid* A. *on ſuch a day, year, and place, requeſted the ſaid* B. *to return the aforeſaid chattels, yet he was not willing to return them, nor yet will, &c.* For reſtoring, after a divorce, ſome goods given in frankmarriage. *Ceo vous monſtre, &c. This ſheweth you* Ellen, *who was the daughter of* A. *who is here, that* N. Fox, *who is there, wrongfully detains and will not return to her chattels to the value of* 10*l. and therefore wrongfully, for that whereas the ſaid* A. *on ſuch a day, year, and place, gave to the aforeſaid* N. *chattels to the value of* 10*l.* (*c*) *namely, corn and grain, in frankmarriage with the ſaid* Ellen, *the ſaid* N. *after eſpouſals ſolemnly had between them, came, and procured one* Alice *to demand him as her huſband by precontract made between them; ſo that at the ſuit of the ſaid* Alice, *and by the procurement of the ſaid* N. *a divorce was had between the aforeſaid* N. *and* Ellen *on ſuch a day, year, and place, before the ordinary, &c. by reaſon of which divorce an action hath accrued to her to demand the aforeſaid chattels given with her in frankmarriage in the form aforeſaid; by reaſon of which the ſaid* Ellen *hath often come to the ſaid* N. *and requeſted him to return the aforeſaid chattels, yet he has never been willing to return them, &c.* (*d*)

VERY little need be ſaid on this action, as diſtinguiſhed from that of debt; they may perhaps be conſidered as identically the ſame in all their proper-

(*a*) Part I. 475. (*b*) O. N. B. 63. (*c*) *Scilicet.* (*d*) O. N. B. 40. b. 41. a.

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ties, proceſs, circumſtances, and form, with the difference, that one was for the recovery of a chattel, the other of money. Any one who had a right to a chattel, tho' he had never been in poſſeſſion thereof, might have this writ to recover it; as where a deed was bailed to *A.* to deliver to *B.* *B.* was intitled to detinue *(a)*. So an heir might have detinue for an *heir loom*, tho' he never had had poſſeſſion thereof *(b)*. There was another writ of *detinue*, which had been held maintainable without any poſſeſſion, but which after ſome diſcuſſion in the former reign *(c)* upon another point, was at laſt held not to be warranted by law; that is, an action by a widow againſt the executor, for her reaſonable part of her huſband's goods. Theſe actions, notwithſtanding that deciſion, continued to be brought, and were variouſly treated by the court.

The point upon which this queſtion reſted ſeems to have no other authority in the law books, than a chapter in *Magna Charta* and a paſſage in Glanville. That chapter of the Great Charter is not directly upon the ſubject of diſtributing the effects of deceaſed perſons; but having ordained a ſurer method of levying the king's debt, it adds, as a ſecurity to the ſubject, that all the reſt ſhall belong to the dead perſon's executors, *ſaving* the reaſonable parts to his relations: a ſaving which ſeems ſufficiently neceſſary, if it were only on account of the particular cuſtoms in ſome places, which required a man always to leave ſomething to his wife and children, and which would otherwiſe have been abrogated by the general ſcope of the former proviſion; and therefore it does not ſeem a neceſſary concluſion from thence, that it was the general law of the kingdom. As to the paſſage in Glanville, there ſeems an ambiguity, if not a contradiction. That author might be quoted as well for as againſt the propoſition *(d)*, *that it was the general law of the kingdom for a man's wife and children to be intitled to a proportion of his effects, notwithſtanding a will.* Upon theſe authorities, together with the determinations mentioned in the laſt reign, ſtood this queſtion, when it underwent the following diſcuſſion.

In the third year of the king we find an action of detinue brought by huſband and wife againſt the executors of the wife's father, for her child's portion: it was laid upon *the cuſtom of the county of Northampton*, and ſhe ſaid ſhe was not advanced by her father: the cauſe went off upon the iſſue, whether married and advanced by her father, without any queſtion ariſing about the right *(e)*. In 17 Edw. III. ſuch a writ of detinue

(*a*) 39 Ed. III. 17. (*b*) 39 Ed. III. 6. (*c*) Vid. ant. 32. (*d*) Part I. 30.
(*e*) Bro. de Rati. Parte, 8. 3 Ed. III.

was

was brought by baron and feme, for her *reaſonable part* of her former huſband's goods, againſt his executors; which writ made mention of the cuſtom of the realm (*a*); but this went off upon another point. In 30th year there was another writ of detinue, ſtating, *Cum per conſuetudinem totius regni Angliæ hactenus uſitatam et approbatam, uxores debent et ſolent a tempore, &c. habere ſuam rationabilem partem bonorum maritorum ſuorum, ita videlicet, quòd ſi nullos habuerint liberos, tunc medietatem, et ſi habuerint, tunc tertiam partem,* &c. It was objected to this writ, that it made mention of common uſage through the whole realm, which could mean nothing but the common law; and if it was the common law, he might have a ſimple writ of detinue: for if a man brought a writ of ael, or aſſiſe of mortauncеſtor, reciting that heirs ought by the common cuſtom of the realm to inherit to their anceſtors who died ſeiſed, the writ ſhould abate. The ſame here; for ſhould a traverſe be taken to this part, it could not be tried by an inqueſt, becauſe it was the common law of the land, which could not be tried by a *pais* of a particular county; but by the court: yet a man might have a writ of the cuſtom of a particular place, as it might be tried by the country; to which it was added, that ſuch a writ as the preſent had been abated before *Sir Wm. Herle*; meaning, no doubt, that before mentioned in the 17th year of Edward II. (*b*). It was argued, that in that caſe the writ was abated, becauſe it mentioned that it was founded on the Great Charter. It was then ſaid, that ſhould a woman bring a writ of dower, and demand a moiety, if the cuſtom was compriſed in the writ, it would be bad; and therefore ſhe ſhould make her demand generally, and upon that ſhould ſhew ſpecial matter of the fee or the country to maintain her demand: ſo it might be here, and the plaintiff might count according to his caſe. Then *Stamford*, one of the clerks, ſhewed a writ that was brought by an infant not advanced, containing all the matter of this writ, which, he ſaid, was held maintainable. Here the debate upon the form of the writ reſted; and when the executors began to reſort to other points, namely, that they were to account before the ordinary, and this queſtion of diſtribution belonged rather to the ſpiritual court than the temporal; they were told they were not to plead to the juriſdiction after they had objected to the writ; ſo that it ſhould ſeem as if the writ was there approved of (*c*).

The next that appears in the books was grounded upon the cuſtom of the county of Suſſex, which allowed a reaſonable part of the *inteſtate* fa-

(*a*) 17 Ed. III. 9. (*b*) Vid. ant. 32. (*c*) 30 Ed. III. 25, 26.

ther's

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ther's goods to the ſon; but this being upon an inteſtacy, contained no debate upon the before-mentioned point; though it was ſaid, this cuſtom bound the father from making a will in prejudice to his wife and children (*a*). It was ſaid this writ, in caſe of inteſtacy, had always been admitted by the ordinary. The next is in the 40th year: this is grounded upon the cuſtom of a vill, by which the children were to have a reaſonable part of their father's goods; but it does not appear whether it was brought againſt executors, or upon an inteſtacy: however, the defendant ſet up an advancement as a plea in bar; to which the plaintiffs replied, that it was only a reverſion, and therefore no lawful advancement to bar his reaſonable portion. The defendant ſaid it was, and demanded judgment, which drew from the bench this ſtrong obſervation. *Thorpe*, one of the juſtices, ſaid, *How can we give judgment, when you have accepted an action which is contrary to the law*, and have pleaded matter in affirmance of it? and *Mowbray*, another juſtice, ſaid, *The lords in parliament would never grant that this action ſhould be maintainable by any common cuſtom or law of this realm.* But as the plaintiff had not pleaded to the writ, the juſtices took time to adviſe what ſhould be done (*b*). The writ in queſtion being grounded on a *particular* cuſtom, and it not appearing whether it was brought in the caſe of a will, or of an inteſtacy, we are left quite at a loſs for the grounds on which the judges pronounced the above-mentioned denunciation; for though there might be arguments againſt ſuch a *general* cuſtom, or againſt alledging it in the writ, it is difficult to ſay that ſuch a particular cuſtom might not be good; though *Thorpe* doubted of it in the former caſe from Suſſex, ſaying, it was hard to reſtrain a man from making a will of his own effects.

THUS the law ſtood at the latter end of this reign as it did at the cloſe of the former; and conformably with this opinion againſt the writ, it is not inſerted in the old *Natura Brevium*, which has only the writ of right, *de rationabili parte*; a writ omitted in Fitzherbert, and the writ of detinue in queſtion adopted, under the title *de rationabili parte*. There is in the *Novæ Narrationes*, a book certainly long prior to the above determination, a declaration in detinue by a widow againſt an executor for a moiety; and it is added in a note, that the ſame would lie *pro hærede de tertiâ parte*, if the wife was alive; and if dead, for a moiety (*c*). What deference was paid to the laſt deciſion will be ſeen in the ſequel. It ſeems ſtrange, that

(*a*) 39 Ed. III. 9, 10. (*b*) 40 Ed. III. 38. b. (*c*) Nov. Narr. 40.

a queſtion

a queſtion of ſo extenſive importance, and ſo frequent recurrence, as the diſpoſition of deceaſed's effects, whether by will or adminiſtration, ſhould remain a doubtful caſe at this time. Perhaps the arbitrary ſway that the ſpiritual court had taken over teſtamentary matters, had prevented this queſtion being much agitated; at any rate, it is difficult at this time to account for ſo ſingular a difference of opinion.

Of detinue.

To return to the common writ of *detinue*. In a declaration upon a bailment of ſheep, the defendant pleaded, that they were bailed to him to feed his ground, and that he gave notice to the plaintiff to take them back, which he neglected; ſo that the defendant diſtrained them damage feaſant; and this was held a good plea in diſcharge of the bailment, without any other poſſeſſion in the plaintiff afterwards; and therefore he was put to traverſe the notice *(a)*. Detinue was held to lie againſt the baron alone, if the bailment was made to the baron and feme, and the writ would abate if brought againſt them both; but if a thing came to a woman's cuſtody, as executrix, and ſhe took a huſband, the action might be againſt the huſband and wife jointly *(b)*. It was once held, that ſhould a thing come to the hands of one executor, detinue would lie againſt him alone, upon the idea that he was charged upon the poſſeſſion only, and not upon the bailment *(c)*; but this was afterwards over-ruled, upon a plea that there were other executors *(d)*.

It was obſerved in the former reign, that the writ of detinue was frequently brought to recover charters that had been depoſited for aſſuring land, and other purpoſes: this was a very common action, but was conſidered as of a particular nature, and differing from the common writ. Thus, after the ſtatute of this king which gave proceſs of outlawry in debt, and detinue of chattels, it was held that *charters*, as they appertained to the freehold, ſhould in an action for them be privileged as the freehold was, concerning which no proceſs of outlawry lay: a *detinue of charters* therefore was not a *detinue of chattels*, and the proceſs was only ſummons, attachment, and diſtreſs. The writ *de chartis reddendis* did not however, in other reſpects, differ from the common action of detinue, except in the deſcription of the ſubject. It was, *Præcipe*, &c. *quòd reddat quandam ciſtam cum chartis ſcriptis et aliis munimentis, ac diverſis chartis et bonis in eâden ciſtâ contentam ſerurâ ipſius* B. *clauſam, quam*, &c.; or, *quandam chartam*, or *duas chartas*, or

(*a*) 43 Ed. III. 21. (*b*) O. N. B. 64. (*c*) 39 Ed. III. 5. (*d*) 41 Ed. III. 30.

quoddam

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quoddam ſcriptum obligatorium, or *quoddam ſcriptum conventionale*, &c. and ſo on, as in the common writ (*a*). A declaration upon a writ *de chartis reddendis* might be thus, &c: *Two charters, two writings obligatory, and one quit-claim, which he detains, and therefore wrongfully, for that the ſaid* A. *ſuch a day, year, &c. bailed to the ſaid* N. *two charters*, ſcilicet, *one charter by which one* Robert Map *infeoffed him of a meſe in* C. *one charter by which one* John P. *infeoffed one* Jordan *at* C. *of the manor of* L. *and two writings obligatory*, ſcilicet, *one writing by which* Walter *was bound to the ſaid* A. *in* 100 *ſhillings, and another by which one* W. R. *was bound to the ſaid* A. *in* 20 *ſhillings, and one quit-claim, in which it was contained, that one* John *to him releaſed and quit-claimed all the right which he had in the manor of* W. *to keep till he demanded them; by reaſon of which the ſaid* A *often came to the ſaid* N. *and requeſted him to return him the aforeſaid charters and writings, yet he was not willing ſo to do, &c.* A TORT ET A DAMAGES, &c. (*b*).

THERE aroſe much debate what writs were to be conſidered as common writs of detinue, and what of the latter kind; and the diſtinction depended on the action being generally for a box of charters, or ſpecially for certain charters by name and deſcription. It was laid down as a rule, that if the plaintiff did not count of a box that was cloſed, or ſealed, he ſhould count of the charters ſpecially, for he might eaſily inform himſelf of them (*c*). In detinue for a bag of charters, it was held, that if the defendant was returned *nihil*, the plaintiff might have a *capias*, becauſe the *bag* was only a *chattel* (*d*); but if the writ was for charters in ſpecial, *capias* would not lie (*e*). Sometimes, when the writ was general for *a box and charters*, the count ſhould be ſpecial, naming the charters; which way of declaring was not at firſt looked upon as conſiſtent (*f*), but was at length allowed (*g*). The advantage gained by this way was, that the tenant was thereby excluded of his law-wager, to which he was intitled upon a general declaration in detinue. Some difficulty was raiſed in theſe actions by the property of the box, and of the charters being in different perſons; the former belonging, as a chattel, to the executor; the latter, as a muniment of his eſtate, to the heir. Yet charters did not of courſe go with the title to the land. It did not follow that the feoffee upon his feoffment became intitled to the charters of the eſtate; for it might be neceſſary for the feoffor to keep them, to enable him to make his claims of warranty and the like againſt his lord paramount (*h*). It was laid down, that where charters were burnt, the plaintiff ſhould recover damages to the value of the land to which they related, if the action was *de chartis reddendis*; but if in treſpaſs, he was to have

(*a*) O. N. B. 65. (*b*) Nov. Narr. 41. (*c*) 39 Ed. III. 7, 8. (*d*) 40 Ed. III. 25.
(*e*) 42 Ed. III. 13. (*f*) 41 Ed. III. 2. (*g*) 44 Ed. III. 41. (*h*) 44 Ed. III. 1.

only

only damages for the taking againſt the peace; therefore, in the former caſe, was neceſſary to alledge the value of the land in the declaration (*a*).

THE writ of *annuity* was nearly allied to the writ of debt, being a demand for arrears of annuity which were detained. The writ agrees with that in the time of Edward I. The following is a ſpecimen of a declaration: *Cēo vous monſtre, &c. wrongfully detains, and will not render to him four marks of ſilver, which are in arrear of an annual rent which he owes him; and therefore wrongfully, for that whereas the ſaid* N. *on ſuch a day, year, and place, obligated himſelf by this deed here preſent, to the aforeſaid* E. *in two marks to be paid to the aforeſaid* E. *on the day of Eaſter from year to year, during all the life of the ſaid* E. *of which the ſaid* E. *was ſeiſed by the hands of the ſaid* N. *till two years before the writ purchaſed, which he has withdrawn to his damages, &c.* (*b*) The proceſs in this writ was ſummons, attachment, and diſtreſs infinite. It was held, this writ would not lie for executors, who, in lieu of this *de annuo redditu*, were to have a writ of debt in the *detinet* (*c*). If the annuitant aſſigned his annuity, the aſſignee could not recover arrears by the writ of annuity, for that would be granting a right of action which the law did not allow (*d*). It was held, that an heir ſhould not be charged with an annuity by preſcription, by the mere payment of his anceſtor (*e*). And whether an annuity was demanded on a preſcription or grant by deed, the plea of *rien arrere* could not be ſupported without an acquittance (*f*). If an annuity was granted to a phyſician, or a lawyer (as was very common), *pro concilio impenſo, et impendendo*, or *pro auxilio, et concilio habendo*, it became diſcharged on a refuſal in the former to attend the grantor, or in the latter to give advice; for it was ſaid, a lawyer was not to be expected to come to his client. If ſuch a grant was with the general reſervation *pro concilio habendo*, and the like, it would be interpreted to mean that which the grantee was beſt qualified by his profeſſion to give (*g*). Annuities were frequently charged upon land, which gave the grantee a power of diſtreſs, and, if interrupted in ſuch diſtraining, an aſſiſe of novel diſſeiſin.

Of accompt.

THERE were two ways of proceeding with perſons who were liable to *accompt*. One was, for the party to bring him to account before himſelf, or before auditors aſſigned by himſelf; the other was, by an original writ of *account* ſummoning him into court to make his account there. If a perſon took himſelf the account of his receivor or bailiff, and he was found in arrears, he had

(*a*) 17 Ed. III. 45. 21 Ed. III. 20. (*b*) Nov. Narr. 37. (*c*) O. N. B. 75. (*d*) 41 Ed. III. 27. (*e*) 49 Ed. III. 5. (*f*) 44 Ed. III. 18. (*g*) 22 Ed. III. 7. 41 Ed. III. 6. 19.

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no further remedy but an action of debt for theſe arrears: if the account was paſſed before auditors aſſigned, he might have his action of debt for the arrears, or proceed in a more ſummary way, by impriſonment under the ſtat. Weſtm. 2. c. 11. (*a*); and the accountant, if falſely charged, might have his writ of *ex parte talis* to re-examine the account in the exchequer, as directed by that act. (*b*)

If the plaintiff choſe neither of theſe courſes, or the party could not be brought to account, he might reſort to a writ of account. The writ was a *Præcipe*, &c. *quòd juſtè, &c. reddat* B. *rationabile compotum ſuum de tempore, quo fuit ballivus ſuus in* C. or, *receptor denariorum ipſius* B. *&c.* (*c*) The following are ſpecimens of declarations in account: *Ceo vous monſtre, &c.* A. *that* N. *&c. wrongfully will not render him a reaſonable accompt of the time that he was his bailiff in* C. *and therefore wrongfully, for that whereas he was his bailiff of the manor of* C. *which was worth* 100*l. per annum, having the adminiſtration of its ſtock, namely, oxen, cows, hogs, and ſheep, and other chattels, from ſuch a day and year to ſuch day and year, by reaſon of which the aforeſaid* A. *often came to the aforeſaid* N. *and requeſted him to render him an account of the iſſues ariſing from the ſaid manor, which he refuſes,* A TORT ET A DAMAGES *of* 100*l.* As receivor, *&c. Adam Pye, merchant, that Robert Fox, merchant, wrongfully will not render his reaſonable account of the time he was receivor of the monies of the ſaid Adam; and therefore wrongfully, for that whereas the ſaid* R. *on ſuch a day, &c. received of the ſaid Adam* 10*l. to merchandize and improve for the uſe of the ſaid Adam, he has merchandiſed with the ſaid* 10*l. and received the profits from the aforeſaid day till ſuch a day* (*d*), *without rendering any account thereof; for which reaſon the ſaid Adam has frequently come to the ſaid* R. *and prayed him to render an account of the ſame, &c.* Again, *And therefore wrongfully, for that whereas the aforeſaid* N. *was the bailiff of the ſaid* A. *from ſuch day continually for a whole year to ſuch a day, of the goods and chattels of the ſaid* A. *namely, of corn, grain, &c. to the value of ten marks, by reaſon of which the ſaid A. often, &c.* (*e*)

This action was the common remedy in mercantile tranſactions, and in almoſt all caſes where there were dealings and an unliquidated demand. The common way of charging the defendant, was either as *bailee* or *reſcievor*; and ſome ſignificant reaſons were given why he ſhould be charged in one or the other character. Where ſilver wares were bailed by the plaintiff to the defendant, to be ſold, and he ſold them, and received the money for them,

(*a*) Part I. 419. (*b*) O. N. B. 60. (*c*) O. N. B. 57. b. (*d*) SANS CEO QUIT. (*e*) Nov. Narr.

it

it was ſaid he ſhould be charged as bailee, and not as receivor; the ſame where one employed a perſon to ſell his wines *(a)*. Again, where herrings were intruſted to a man to ſell, it was held the action ſhould be againſt him as bailee, not as receivor; and the reaſon given was, that a receivor was allowed no coſts, and a bailee was: therefore the defendant, who might have been obliged to go from one place to another to ſell theſe articles, ſuffered an injuſtice if he was declared againſt as receivor of money where he would not be allowed his expences *(b)*. But this action would lie againſt others than receivors and bailees. Where a lord had entered lands as guardian in chivalry, and it was meant to try whether they were not ſoccage, an action of account was brought againſt him *as occupier* for the profits he had received (*c*); though, perhaps, in this caſe, the proper idea was that of a *receivor*, which was an univerſal character that ſuited every one who had received money or profit to the uſe of ſomebody elſe, for which he ought to account. Upon this principle it was that the following actions were ſupported. Two being poſſeſſed of an ox in common, and one having ſold it, the other might have account againſt him; ſo where trees were cut by one who held *pro indiviſo* with another *(d)*. If tenant by *elegit* committed waſte, the remedy was a writ of accompt, and not waſte (*e*). Money was bailed to have a ſecurity of land given for it, if not, to be rebailed; upon no ſecurity being given, an action of accompt lay *(f)*. One joint leſſee for years might have accompt againſt another, if he took the iſſues and profits to his own uſe; for he would otherwiſe be without remedy, as he could not have an aſſize. But one executor could not have account againſt the other, becauſe they took nothing to their own uſe, and they were bound to account before the ordinary. If two guardians were in common, and one took the intire profits to his own uſe, accompt lay, and the count was to be againſt him as receivor to their common uſe: ſo of coparceners; but not ſo of tenants in common, for they might have an aſſiſe *(g)*. If a defendant was counted againſt as receivor, the plaintiff muſt alledge by whoſe hands he received; but if he could not put this in certain, he might charge him as bailee, and then it would not be neceſſary (*b*).

In this action there were two judgments: the firſt was *quòd computet*, upon which auditors were aſſigned; and after the account made, then came the final judgment for the arrears. As the writ was grounded upon a complaint that

(*a*) 46 Ed. III. 3. (*b*) 46 Ed. III. 9. (*c*) 49 Ed. III. 10. (*d*) 42 Ed. III. 22.
(*e*) Bro. Accompt 36. (*f*) 41 Ed. III. 7. (*g*) 39 Ed. III. 27. (*b*) 43 Ed. III. 21.

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he refuſed to account, it was reaſonable that *plenè computavit* ſhould be a good plea to the action, and an account before the plaintiff would be ſufficient (*a*). He might plead *ne unque receivor*, or *ne unque receivor per main* I. N. the perſon thro' whoſe hands the declaration alledged him to have received monies; that he was not bailiff to the plaintiff of ſuch a manor, but leſſee. He might plead a releaſe of all receipts; he might plead nonage (*b*); and if any of the above pleas were found againſt him, there would be a judgment *quòd computet*. He might plead *priſt d'accompter*; and then there was of courſe the ſame judgment, and auditors would be aſſigned. Before the auditors he would be allowed to alledge ſuch matters as would go in diſcharge of himſelf. He might plead payment to the plaintiff without ſhewing an acquittance (*c*). Upon the judgment to account, there lay the proceſs of *capias* and outlawry againſt the defendant, according to the ſtatute of Weſtm. 2d. It was held, that the firſt judgment was not ſuch as could be revived by *ſcire facias* upon the death of the plaintiff before the account taken; nor could a writ of error be brought thereon, yet the plaintiff could not be nonſuited after it (*d*). It was on the final judgment only that execution could be had. It was held, that where there were two defendants, and one was ſued to outlawry and then taken, and the other not, they might proceed alone againſt him that was taken (*e*).

An action of *covenant* was the common remedy where an indenture of agreement was ſealed and properly executed by two parties, and one of them did not perform his part. This writ was always founded upon ſuch a ſpecialty; and the proceſs was ſummons, attachment, and diſtreſs. The following is a ſpecimen of a declaration upon a writ of covenant: *A tort, &c. wrongfully keeps not the covenant made between them, to maintain honourably the aforeſaid Edward in living and cloathing, as long as the one and the other lived; and therefore wrongfully, for that whereas on ſuch a day, year, and place, a covenant was made between the aforeſaid Matthew and Edward, by which the aforeſaid Matthew granted by his deed here ſhewn, to maintain honourably the ſaid Edward in living and cloathing as long as the one and the other lived; yet the ſaid Matthew the aforeſaid Edward according to the form of the aforeſaid covenant maintains not; by reaſon of which he has often come to him, and prayed him to*

(*a*) 41 Ed. III. 3. 9. 45 Ed. III. 14. (*b*) 49 Ed. III. 10. 21 Ed. III. 8. 24 Ed. III. 32. 67. 10 Ed. III. 7. (*c*) 41 Ed. III. 25. (*d*) 21 Ed. III. 9. 32. 42 Aſſ. 11. (*e*) 41 Ed. III. 9.

keep

keep this covenant according to the form of the writing aforeſaid, but he would not, nor yet will, A TORT, *&c.* (*a*).

A WRIT of covenant was that upon which fines were moſt commonly levied. In ſuch caſe, the declaration was, A TORT, *and wrongfully keeps not his* FINE *made in the court of*, &c. &c. unleſs indeed the covenant to convey had been made out of court, and then it was termed a mere covenant. Indeed, in moſt caſes, there was not actually a previous fine or covenant, but the writ of covenant was brought upon ſuch *ſuppoſed* tranſaction; and, being an amicable proceeding, it paſſed of courſe without enquiry, and was afterwards maintained for the aſſurance of eſtates, and the quiet of property. Theſe were called covenants *real*; the writ of covenant in this inſtance having the effect of actually transferring the land, and ſo producing a *ſpecific* effect. Other writs of covenant were ſaid to be *perſonal*, becauſe damages only were recovered for the breach of covenant. There was one inſtance in which a doubt ſeems to have ariſen, whether this writ was real or perſonal. We have ſeen, that a writ of covenant (*b*) was the remedy which a termor for years had againſt his leſſor when ejected, and that the *quare ejecit infra terminum* was contrived in aid of this writ. However, it was ſtill held, that where a leſſor ouſted his leſſee, the latter might in covenant recover both his term and damages; and if the term was expired, he would recover the whole in damages (*c*). In the 38th year, when it was ſaid that a term ſhould be recovered in covenant, it was denied by *Thorpe* and *Skip*, who ſaid the plaintiff ſhould recover only damages (*d*); though by a caſe in the 47th year it ſhould ſeem, the general opinion was, that in covenant by the leſſee againſt the leſſor, he ſhould recover his term (*e*).

ANOTHER point of debate in covenant was, whether the obligation or the benefit derived from ſuch agreements deſcended on the repreſentatives of the covenantors and covenantees. It was clearly held, that an executor was not bound to perform a covenant, if the covenantor had not bound his executors expreſly; for covenants only bind thoſe who make them, and not their heirs or executors, unleſs named (*f*). But where land was let to one *habendum* to him and his aſſigns for years, it was ſaid that the aſſigns might have an action of covenant againſt the leſſor, even though they were not named

(*a*) Novæ Narr. 44. b. (*b*) Part I. 250. (*c*) 26 Ed. III. Fitz. Cov. 3. (*d*) 38 Ed. III. 24. (*e*) 47 Ed. III. 24. (*f*) 48 Ed. III. 1.

in

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in the deed (*a*). And where one brought an action of covenant as heir againſt an abbot for not performing ſervice in the manor-chapel, and it was objected he had an elder brother, and ſo was not heir; it was agreed by the court, that if he was *terre-tenant* it was ſufficient, and he might have the action without the privity of heir, becauſe it was a covenant that went along with the land. Again, where, upon a partition between parceners, one covenanted to diſcharge the other from all ſuits, it was held, an alienee ſhould have covenant if he was not diſcharged (*b*). And this ſeems to have been the principle upon which repreſentatives might claim the benefit of, or be liable to, covenants, namely, if they were attached to, and dependent upon, the land which they enjoyed.

The action of *replevin* might be proſecuted either before the ſheriff, or *in banco*. If in the court above, it might be in two ways; either by original writ at common law, or by *pone*, according to ſtat. 2 Weſtm. c. 2. (*c*) The following is a ſpecimen of a declaration *in banco*: *Ceo vous monſtre, &c. that* D. *&c. wrongfully took the cattle, &c. namely, &c. ſuch a day, year, and place, and chaſed them to his houſe, and there impounded them, and them ſo impounded detained from ſuch a day to ſuch a day then next enſuing, when deliverance was made by John, &c. a bailiff of our lord the king, ſworn and known, &c. à tort et à damages, &c.* (*d*). The proceſs in this action was ſummons, attachment, and diſtreſs. If the ſheriff could not find the cattle to make replevin, we have ſeen that, in Bracton's time (*e*), he was to take ſome of the defendant's cattle; and if the defendant had no land or chattels, then he was to be perſonally attached. The ſame courſe ſtill obtained, only ſome new terms had been adopted: the cattle ſo removed were ſaid to be *eloigned*; and upon the ſheriff returning the *averia elongata*, there iſſued a proceſs to take the defendants, called *capias in withernam*; and if that failed, there went a *capias* againſt the perſon (*f*). With theſe immaterial alterations in expreſſions, the proceeding in replevin ſtood upon the foot of the practice in Bracton's time, and the ſtatutes of Edward I. The requiſites to this action are ſaid to be ſix; 1ſt, very tenant; 2d, very lord; 3d, ſervices; 4th, arrear at the day of taking; 5th, ſeiſin of the ſervice; 6th, within his fee (*g*). As the defendant in his avowry was to ſet forth his title to make the diſtreſs, the obliging him to alledge *ſeiſin* kept the inquiry within bounds, and prevented a debate upon the *right*, which was not

(*a*) Bro. Cov. 45. (*b*) 42 Ed. III. 3. (*c*) Part I. 334. 417. (*d*) Novæ Narr. 62. b. (*e*) Part I. 335, 336. (*f*) 43 Ed. III. 26. (*g*) O. N. B. 41. b.

to

to be decided by any trial but the duel or great aſſiſe, neither of which could be had in this action; and the ſeiſin had been limited by the 2 Weſtm. (*a*) to the time allowed for bringing an aſſiſe. Thus every queſtion of title that might be agitated in a writ of novel diſſeiſin, might be brought forward by a writ of replevin, only the effect was different; as the former only gave the ſeiſin of the diſtreſs, the latter the ſeiſin of the land. However, it naturally followed, that many titles to real property were tried in replevin. The proceſs upon the writ of *recaption* was the ſame as that upon the *pone* and replevin. There was a writ *de catallis nomine diſtrictionis captis reddendis*, which could only be maintained within a borough, where it was the cuſtom to take the doors, windows, or grates in the way of diſtreſs (*b*).

Of treſpaſs.

THE action of *treſpaſs* became in this reign ſtill more general than in the former; and though ſimple in its firſt origin, it was by conſtruction and legal intendment rendered applicable to an infinity of caſes where an injury was done either to the perſon or property. The manner of declaring upon this writ was rather general, without ſtating much particularity of circumſtances. The following are ſome examples of declarations, &c. *Wrongfully came, ſuch a day, &c. and* vi et armis, *namely, &c. the aforeſaid* N. *took and impriſoned, and in priſon him detained from ſuch a day to ſuch a day, on which he was delivered by the king's writ; and other harms, &c. namely, &c.* A TORT *and againſt the peace of our lord the king, &c.* For various treſpaſſes: *Ceo vous monſtre, A. &c. that C. &c. ſuch a day, year, and place, came with force and arms, namely, &c. in the park of the aforeſaid* A. *at* J. *in the ſaid county, and there entered, and therein being without his licence and will, ſix deer chaſed and took, and his trees there growing, namely, &c. of the value of* 10 *marks cut; and in his ſeveral fiſhery fiſhed, and his fiſh, namely, &c. of the value, &c. took and carried away, and other injuries to him did,* à tort et à damages, *&c. and againſt the king's peace* (*c*).

WHEN this writ was brought for a treſpaſs on land, it led to a juſtification upon a title, like the avowry in replevin; but this happened very rarely, it not being ſo uſual to bring on queſtions upon titles in this as in the writ of replevin. When a title was ſet out in this action by the defendant, it was not neceſſary for the plaintiff to do the ſame, but merely to deny or traverſe the defendant's ſuppoſed title: the plaintiff, as he was in poſſeſſion, was preſumed to have a right to that poſſeſſion, and therefore the law would not put him

(*a*) Part I. 418. (*b*) O. N. B. 73. (*c*) Novæ Narr. 74. b. 66. b.

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to ſtate it ſpecially (*a*). Thus where right of common was pleaded, the plaintiff only replied, *de ſon tort demeſne, ſans ceo que il ad common, priſt*, &c. (*b*). Where a defendant juſtified as taking poſſeſſion under the eſcheator, the reply was, *a votre oeps demeſne ſans tiel cauſe* (*c*). The ſame idea prevailed in other writs of treſpaſs that did not relate to land; and the defendant, as a wrong-doer, was expected to make out a juſtification when called upon by the plaintiff who had ſuſtained the injury.

THE principal and moſt common actions of treſpaſs now in uſe, were three; namely, thoſe for an injury to the perſon, as for battery or aſſault, thoſe for taking goods, and thoſe for entering land or a houſe; that is, a *cepit & aſportavit*, and, as it had been ſince called, a *clauſum fregit*. In order to underſtand the notions now entertained concerning theſe actions, we ſhall conſider ſome caſes applicable to each of theſe heads, beginning firſt with *battery*.

ACTIONS for a battery were uſually laid with an aſſault alſo; *inſultum fecit, et ipſum verberavit, vulneravit, et malè tractavit*, &c. In the 22d year, a jury found that the defendant ſtruck at the plaintiff with a hatchet, but did not hit him; and they prayed the diſcretion of the court, as to the law upon the point, when the damages were ordered to be taxed for the aſſault only, and the judgment againſt the defendant was, *capiatur* (*d*). Again, where a defendant was found guilty of the aſſault, but not guilty of the battery, the plaintiff recovered damages for the former, and was amerced for the latter (*e*). Thus an aſſault began to be conſidered as a diſtinct and independent cauſe of action. The day on which the battery and aſſault were laid, began to be conſidered as of no conſequence; for where a battery was found to be on the day, and on a day after, and even where they found it on another day, it was held ſufficient to ſupport the declaration (*f*). It was eſteemed a good juſtification in aſſault and battery, to ſay, that the plaintiff was in a rage, and the defendant only reſtrained him from doing miſchief (*g*). If a perſon had recovered damages in an appeal of mayhem, this was looked upon as a recompence only for the wounding, and he might afterwards have an action for the battery (*h*). However, in an action of battery, the plaintiff might

(*a*) 40 Ed. III. 5. (*b*) 22 Aſſ. 42. (*c*) 22 Aſſ. 57. (*d*) 22 Aſſ. 60. (*e*) 40 Ed. III. 40. (*f*) 39 Ed. III. 1. 45 Ed. III. 24. (*g*) 22 Aſſ. 57. (*h*) 22 Aſſ. 82. 43 Aſſ. 39.

give

give in evidence a mayhem (*a*); as he was not to be wholly deprived of redreſs, though he choſe to reſort to one inferior to an appeal. If a wife was beat, an action of battery lay for the huſband and wife; and though the huſband only would have the damages recovered, yet, being originally the redreſs of the wife, it might be laid *ad damnum ipſorum* (*b*). An action of battery would lie for the maſter againſt any one who beat his ſervant (*c*). An action *vi et armis* would lie alſo for the taking away of his ſervant (*d*), and *à fortiori*, for taking away his villain; but if any one married a female villain, and afterwards took her away, the lord had no remedy *vi et armis* againſt the huſband (*e*). A man might have treſpaſs for taking away his eldeſt ſon (*f*). Theſe were properly treſpaſſes on a *cepit et aſportavit*; as was that *de uxore abductâ cum bonis viri*; in which it was held to be no plea to ſay, that the plaintiff was divorced from his wife; for it was for damages, which ſhould equally be recovered, if they were married at the time (*g*). However, it was agreed, that where two were married before years of conſent, the huſband could not have this action till he had arrived at ſuch age, and they had aſſented or diſſented from the marriage (*h*).

When treſpaſs was brought for goods, it ſometimes became a queſtion, what ſhould be conſtrued a *taking*, and what *vi et armis*. A defendant pleaded, that the goods were thrown into the ſea in a ſtorm, and he took them, and when he came to land he gave them the plaintiff's ſervant, to his uſe; and this was held a bar of the taking and treſpaſs (*i*). One tenant in common might have treſpaſs againſt another of things ſevered from the land, as corn, hay, and the like; but not of things fixt to the freehold, for then they might have waſte *pro indiviſo* (*k*). Yet where goods were left to an executor and another to diſtribute, it was held, that treſpaſs would not lie for the one againſt the other (*l*). Again, though an heir might have detinue of charters againſt an executor, he could not have treſpaſs (*m*). The *primâ facie* right was held to privilege ſuch perſons from the imputation of treſpaſſors. Where a perſon acting under authority of law any ways abuſed that authority, he became a treſpaſſor. As in treſpaſs for taking and killing the plaintiff's horſe *contra pacem*; the defendant juſtified as

(*a*) 39 Ed. III. 20. (*b*) 46 Ed. III. 3. (*c*) 39 Ed. III. 1. (*d*) 39 Ed. III. 37.
(*e*) 46 Ed. III. 6. (*f*) 29 Aſſ. 35. (*g*) 23 Ed. III. 23. (*h*) Bro. Treſp. 420.
(*i*) 46 Ed. III. 15. (*k*) 21 Ed. III. 9. 29. (*l*) 27 Aſſ. 64. (*m*) 43 Ed. III. 24.

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taking it *damage feaſant*, and impounding; and becauſe it had leaped ſeveral times over the pound, he tied it, and *ſo* the horſe ſtrangled itſelf; which plea was held ill upon demurrer (*a*).

When the writ was for breaking a houſe, or entering land, the plaintiff was not to alledge a *continuance* of the treſpaſs, becauſe it was a ſingle act: but where it was for depaſturing graſs, and the like, it might be laid with a *continuando* (*b*). There was long time a doubt how far this action would lie for a leſſee againſt his leſſor, and the contrary. We have ſeen that the new action of *ejectione firmæ*, being an action of treſpaſs *vi et armis*, was thought not to lie againſt the leſſor, though he had been guilty of violating his leſſee's poſſeſſion, in direct oppoſition to his own leaſe (*c*). This was upon the idea of the leſſor's freehold, and the right he had of entering upon any part of it; while the leſſee was conſtrued to have a precarious poſſeſſion, that made him little more than bailiff to his leſſor. But the opinion of a farmer's intereſt was now altered, and the plea of freehold had long been diſregarded; therefore, where a leſſor diſtrained, or did any other act upon the land which in the caſe of a common perſon would be treſpaſs, the leſſee for years might have treſpaſs *vi et armis* (*d*). On the other hand, where in a leaſe to one for life there was a reſervation of certain trees, which trees the tenant cut; there it was held, that treſpaſs *vi et armis* would lie by the leſſor againſt the leſſee for cutting the trees (*e*). Treſpaſs was a remedy grounded upon the actual poſſeſſion of the plaintiff; therefore it was a rule, wherever a perſon was any way put out of poſſeſſion, he could not maintain treſpaſs till he had made a re-entry (*f*).

Respecting treſpaſs in general; it had long been held, that there were no acceſſaries in treſpaſs, but all were principals; and therefore, that a perſon, by aſſenting afterwards to a treſpaſs committed, was liable to an action (*g*). A writ of treſpaſs, as it was a wrong done, was to be brought againſt the wrong-doers individually, and therefore it would not lie againſt a corporation, againſt which no *capias* could iſſue (*h*): and it was agreed, that more treſpaſſes than one might be joined in one writ. It was a common plea in treſpaſs for hunting, to ſay, that the defendant had *licence* (*i*). In all actions of treſpaſs, any matter ſtated as a recompence to the plaintiff might be

(*a*) 27 Aſſ. 64. (*b*) 46 Aſſ. 9. (*c*) Vid. ant. (*d*) 48 Ed. III. 5, 6, 7. (*e*) 46 Ed. III. 22. (*f*) 44 Ed. III. 18. (*g*) 38 Ed. III. 18. 30 Aſſ. 6. (*h*) 22 Aſſ. 67. (*i*) 42 Ed. III. 1, 2.

pleaded

pleaded in diſcharge; as, recovery in another action; amercement in an inferior court (*a*); or, that he had *agreed* with the plaintiff for the treſpaſs (*b*); or, even ſuch as was only in a courſe of giving the plaintiff ſatisfaction, namely, that an action of replevin was depending for the ſame taking (*c*). An officer might juſtify in treſpaſs under the proceſs of a court, however erroneous; but not ſo, if the cauſe of action aroſe without the limits of the court's juriſdiction (*d*).

Of actions on the caſe.

But not contented with the writ of treſpaſs in its old form, they endeavoured to make it more univerſal, by enlarging its ſcope, and modifying its terms, ſo as to adapt it to every man's *own caſe*; in doing which they availed themſelves of the ſtatute 2 Weſtm. authoriſing writs to be framed *in conſimili caſu*. This novelty did not ſhew itſelf till towards the middle of this reign; and when it appeared in court, it underwent a diſcuſſion and debate that indicated great doubt about the nature of the innovation.

The firſt caſe of this ſort, to be found in the Reports, is in the 22d year; when an action was brought againſt a man, for that he had undertaken to carry the plaintiff's horſe in his boat over the Humber, ſafe and well; but that he overloaded his boat with other horſes, by which overloading the plaintiff's horſe periſhed, *à tort et à damages*, &c. It was objected to this bill, that it ſuppoſed no *tort* in the defendant, but on the other hand proved the plaintiff ſhould rather have a writ of covenant. But it was ſaid by one of the judges, that the defendant committed, as it ſhould ſeem, a treſpaſs in overloading the boat, by which his horſe periſhed, and that the action would lie (*e*). Thus the notion of a treſpaſs, or a *malfeaſance*, was the principle upon which the application of this new remedy was explained, and juſtified, even in this inſtance, which ſeems to approach nearer to the nature of a contract.

It was taking the idea of treſpaſs in a very large ſenſe, to conſider this and ſome writs which follow to be at all allied to it. From this time to the 42d year, we find mention of ſeveral actions, and *dictums* concerning remedies, which could be no other than actions formed upon the ſpecial *caſe* of the party, without including any treſpaſs, except of the vague kind above ſuppoſed. It was ſaid, that, ſhould a contract be made between two men, that one ſhould give the other 10l. in caſe he would marry his daughter, an action would lie for the money (*f*). Now this action could

(*a*) 47 Ed. III. 19. (*b*) 22 Aſſ. 51. (*c*) 38 Ed. III. 35. (*d*) 22 Aſſ. 64.
(*e*) 22 Aſſ. 41. (*f*) 22 Aſſ. 70.

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not be ſuch a one as we have hitherto in the courſe of this Hiſtory met with; for covenant, which ſeems the only writ applicable to ſuch a caſe, would not lie but upon a deed; it muſt therefore have been a ſpecial writ upon the caſe. We find ſeveral of the ſame kind: An action againſt a ſheriff for quaſhing the plaintiff's eſſoin in a plea of replevin before him, without the aſſent of the ſuitors *(a)*: An action againſt a ſheriff for a falſe return of ſummons *(b)*; for directing a wrong officer to ſummon a pannel, which was therefore quaſhed *(c)*: An action of ſlander for calling the plaintiff traitor, felon, and robber *(d)*: An action againſt a man, becauſe he took certain cattle from another, and offered them to ſale to the plaintiff as his own, who, confiding in his word, bought them, and they were afterwards taken from him by the true owner *(e)*: All theſe were new-formed actions; thoſe againſt the ſheriff being writs of *deceit upon the caſe* (mentioned under that name in the old *Natura Brevium*) introduced in the room of the writ of deceit which has been mentioned before, and were merely for the purpoſe of recovering damages againſt the ſheriff. Two of them were ſuch for which the old law provided no remedy, matters of ſcandal being wholly of ſpiritual cognizance; and the laſt being within the ſcope of none of the common-law writs which have been met with in former reigns.

The ſame may be ſaid of the following: *Treſpaſs* (ſays the Report) was brought againſt an inn-keeper and his ſervant; upon which the plaintiff counted, Whereas it was a cuſtom and uſage through all the realm of England, that in all common inns the inn-keeper and his ſervants ſhould take good care of what things their gueſts ſhould have in their chamber in the inn, the plaintiff came to the defendant's inn, and left certain things in his chamber there; and while he was gone out, ſome perſons came and took them away, through the neglect of the defendant and his ſervants, *per tort, et enconter les peas*, and to the damage of the plaintiff, &c, and he had (ſays the Report) a writ upon the whole matter *according to his caſe*; and the action was held good *(f)*.

In the foregoing caſes there was no debate upon the form of the action; in the following ſome few objections were ſtarted, which ſerve to give ſome better idea of the notion they then entertained of theſe ſpecial writs. An action of treſpaſs was brought againſt a farrier, for that being employed

(*a*) 26 Aſſ. 45. (*b*) Ibid. 48. (*c*) 38 Aſſ. 13. (*d*) 30 Aſſ. 29. (*e*) 42 Aſſ. 8. (*f*) 42 Ed. III. 13.

to

to ſhoe the plaintiff's horſe, *quare clavum fixit in pede equi ſui in certo loco per quod proficuum equi ſui per longum tempus amiſit, &c.* To this writ it was objected, that it was in treſpaſs, and yet was not laid *vi et armis*. It was anſwered, that the plaintiff's writ was according *to his caſe*, and therefore good; and though it was ſtill urged that the writ ſhould ſay *vi et armis*, or *malicioſè fixit*, and if any trepaſs was done, it ought to be *againſt the peace*, yet the writ was held good *(a)*.

This ſeemed to be giving up the idea of treſpaſs intirely. But notwithſtanding this reaſoning, we find the name was ſtill preſerved; for two years afterwards there is a report of a writ of *treſpaſs ſur ſon caſe* brought by a man againſt a ſurgeon, much upon the ſame ground as that juſt mentioned. The writ ſtated, that the plaintiff's right hand had been hurt, and the defendant undertook to cure it; but by the negligence of the defendant, and his want of care, his hand was made ſo much worſe, as to become a mayhem, *à tort et à ſes damages*, and the writ was neither *vi et armis*, nor *contra pacem*. However, this was held good, and treated as an action of treſpaſs: and yet, becauſe it did not alledge force and arms, and *contra pacem*, it was conſidered, ſo far, as differing from treſpaſs, properly ſo called; and for that reaſon it was the opinion of one of the juſtices, that the defendant ſhould be admitted to wage his law *(b)*.

The following is termed by the Reporter, treſpaſs *upon the caſe*, and yet is laid *vi et armis*, and *contra pacem*. It was brought againſt a miller, and the writ charged, *quòd cùm prædictus Johannes, &c. et anteceſſores ſui à tempore cujus memoria non exiſtit, molere debuerunt ſine multurâ, &c. prædictus defendens, &c. prædictum querentem ſine multurâ molere vi et armis impedivit, &c.* Upon which the plaintiff declared, that when he came to have his corn ground, the defendant took two buſhels, &c. with force and arms. It was objected to this, that as the plaintiff, in his declaration, ſtated that the defendant *took toll*, he might have had a general writ of *cepit et aſportavit* his corn with force and arms, and not this ſpecial writ. To this it was anſwered, that ſurely the plaintiff, if he had ſuſtained an injury, was entitled to a remedy applicable to his caſe. But the court decided, that as he muſt have brought a general writ if all his corn had been taken, ſo he muſt if part was; and therefore it was held that this writ was not good *(c)*. However, about three years afterwards the ſame writ was held good *(d)*. Again, we

(a) 46 Ed. III. 19. pl. (b) 48 Ed. III. 15. (c) 41 Ed. III. 24. (d) 44 Ed. III. 20.

find

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find an action of treſpaſs againſt a woman for burning the plaintiff's houſe with force and arms. There was no debate upon the form of the writ, though the jury found that the houſe was burnt by negligence, and not with force and arms, or malice, and that the houſe in queſtion was rented by the woman from the plaintiff, from year to year (*a*). The new writ of *ejectione firmæ*, and that of *reſcous*, were ſpecial writs of the ſame doubtful kind.

FROM the foregoing inſtances it appears not to have been well agreed when the proper remedy was a general common-law writ of treſpaſs, and when theſe ſpecial writs; nor again, when a ſpecial writ ſhould be laid *vi et armis*, and when not. Theſe were difficulties in this new remedy, which were left to be ſettled by the refined notions that obtained in after-times upon this ſubject. The great motive to inſerting *vi et armis* was, that the plaintiff became thereby entitled to proceſs of *capias*, and the defendant could not wage his law; whereas in a writ not containing that ſuggeſtion, there lay only *diſtringas*, and the defendant might wage his law.

Proceedings by bill, &c.

THUS far of particular actions: we ſhall next ſpeak of the proceeding and proceſs, which were more or leſs applicable to all the foregoing writs. Whatever conjectures may be formed concerning the origin of proceedings *by bill*, it is beyond all queſtion that actions were brought in this way during all this reign, and the books are full of them. But we are not enabled to pronounce upon the nature and properties of this new method, as no debate aroſe upon it. We can only ſay, that they proceeded by bill in all the three courts, the king's bench, common pleas, and exchequer; that the bill begun *A. queritur de B.* &c. and went on as a common writ; nor does it appear, from any of the caſes reported, that in bills in the king's bench there was any mention of the cuſtody of the marſhal. If that was the ground of juriſdiction, it was ſo underſtood, and not thought neceſſary to be alledged. The bills in the exchequer are in general againſt ſheriffs, who may be conſidered as privileged perſons, in the light of king's officers. The bills in the common pleas were ſometimes for and againſt attornies. There is one brought *qui tam pro domino rege, quàm pro ſeipſo*; and was for an aſſault by a perſon, who, being plaintiff in an action in that court, and bringing a writing thither to prove his caſe, was attached by the defendant (*b*). This being a contempt of the king's peace and juſtice, might for that reaſon be conſidered as the ſubject of an action in that form. It was laid down, that a perſon might have an appeal by bill in the king's bench of

(*a*) 48 Ed. III. 25. (*b*) 30 Aſſ. 14.

any

any matter that touched the king, whether mediately or immediately (*a*). For further information on this ſubject, we muſt wait till we arrive at later times, when they began to ſpeak plainer about the commencing of actions by bill, and the extent of this privilege was explained by certain and ſettled rules.

THERE was another courſe by which matters uſed to be commenced or forwarded in court, which was by *ſurmiſe* or *ſuggeſtion*. In one ſenſe of theſe terms (and the original one), in all probability, nothing more was meant than a verbal application, praying that proceſs might iſſue for carrying on a ſuit already commenced; and in that ſenſe we frequently meet, in the Reports of this reign, with a *ſuggeſtion to the court* (*b*). But there certainly was in the exchequer an original commencement of a ſuit, as has been mentioned in another place, by a mere verbal ſurmiſe or ſuggeſtion (*c*); and though this was ſometimes diſputed in the caſe of common perſons, yet it was ſtill held to be the courſe of that court, and, in the caſe of the king, was not attempted to be withſtood (*d*). This was the ſhape in which that proceeding firſt ſhewed itſelf, which afterwards grew into an *information*.

Of pleading.

PLEADING in cauſes was carried on through great part of this reign much in the way in which it was deſcribed in the former period; but it is ſaid, that about the middle of this reign it became the practice to draw up the declaration and pleas out of court, and deliver them in writing to the prothonotary, from whom the adverſe party received a copy, to enable him to give in his plea in anſwer. The book intitled *Novæ Narrationes* may be a confirmation of ſuch conjecture. However, there appears nothing in the Reports of this reign to aſſure us of any ſuch alterations; for they ſtate the pleading on both ſides in the ſame manner as the Reports of the time of Edward II. as though they were debated *vivâ voce* in court. Yet it cannot be denied, that, towards the latter part of this king's time, pleading was brought to more certainty and ſyſtem than it had before exhibited; ſuch as it was natural ſhould follow from the deliberation with which proceedings might be penned when drawn out of court. It is therefore truly ſaid by Sir Matthew Hale, that pleadings were now ſomewhat more poliſhed than in the former reign, without running into uncertainty, prolixity, or obſcurity (*e*). The putting of pleadings into writing was the firſt ſtep towards the refine-

(*a*) 17 Aſſ. 5. (*b*) Paſſim. (*c*) Vid. ant. 93. (*d*) 40 Aſſ. 35. (*e*) Hiſt. Com. Law, 173.

ment

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ment and ſubtlety into which pleaders ran in after-times; though at preſent they went no further than was neceſſary to bring the matter in queſtion before the court with due clearneſs and preciſion.

SUFFICIENT has been ſaid, in ſpeaking of different actions, to give ſome idea of the ſtate of pleading at this period: what remains to be added will be very ſhort and general. It ſeems, that in the beginning of this reign the order of pleading to the count before the writ was getting into practice; for it is ſaid in the 4th year, that after *oyer* of the writ (which was neceſſary previous to its being pleaded to) the defendant ſhould not plead to the count (*a*); and though afterwards (*b*) the contrary was permitted, yet a few years after, namely, in the 30th year, it ſeems to have been ſettled in the following way: that a perſon ſhould plead firſt to the juriſdiction, then to the perſon of the plaintiff or defendant, then to the count, then to the writ, and laſtly to the action (*c*). There might be reaſons of convenience and propriety which contributed to eſtabliſh this courſe. Since pleadings were put into writing, the count became more ſtrict and formal; and, as it contained the ſubſtance of the writ, was ſufficiently full and explicit to become the firſt object of criticiſm to the defendant, as the writ had been in earlier times (*d*); and therefore in his defence he was expected firſt to take notice of that, or intirely waive it.

THE faſhion of theſe times was to ſtate ſpecial matter of juſtification or title in almoſt all actions, and to avoid as much as poſſible the general iſſue: this led to much vying and revying on both ſides. Perhaps this aroſe from the nature of aſſiſes and real actions, which being for the trial of ſome title, neceſſarily called upon the parties to ſtate many ſpecial circumſtances; and the perſonal actions in uſe naturally partook of the prevailing taſte; not to mention, that in treſpaſs and replevin it was no uncommon thing to litigate ſome queſtion of title.

The ſecta and law-wager.

WE have ſeen in the former reign, that the practice of examining the *ſecta* had worn off, though they ſtill continued to be produced: but ſince they had thus become almoſt uſeleſs, it may be doubted whether they continued even to be produced; at leaſt, there is no mention of the *ſecta* all through this reign; tho' the formal concluſion of declarations by *inde producit ſectam*, as it was ſtill uſed, preſerved a remembrance of the old practice. However, the *ſecta* were ſtill produced by a defendant, who waged

(*a*) 4 Ed. III. 133, 134. (*b*) 24 Ed. III. 35. 47. (*c*) Thel. Dig. lib. 10. c. 1. 21. (*d*) Part I. 479.

his

his law, though it may be preſumed they were never examined; as the only object of ſuch examination had formerly been, to confront and weight their evidence againſt that of the plaintiff's *ſecta*.

THE law-wager did not ſeem to be ſettled upon ſuch fixed principles, as to leave no doubt about the inſtances where it ſhould, and where it ſhould not, be allowed: we find ſome difference of opinion upon this point. The ſtate in which this piece of old law ſtood in this reign, will be better underſtood from a ſhort view of ſome adjudged caſes.

WE have before ſeen, that a defendant was not permitted to wage his law againſt an obligation: however, though he could not deny the obligation, and the debt grounded thereon, in this way, he was allowed, in an action upon a deed, the privilege of waging his law of non-ſummons, and the like, in the ſame manner as had long been uſed (*a*). We have ſeen, that the antient cuſtom of waging law againſt tallies, was in one inſtance confirmed by a ſtatute of this reign. The following are ſome inſtances of law-wager. In accompt, the defendant ſaid, that he gave the plaintiff a ſtatute for the debt, and a tunnel of wine for the damages; to which the plaintiff replied, that he never received them, and tendered his law, which was received (*b*); the iſſue being conſidered as in the nature of the general iſſue in detinue, where the law-wager was the common trial. In an action of accompt where the receipt was alledged to be by the hands of another, the law-wager was allowed (*c*): the ſame alſo in debt upon the arrearages of an account (*d*).

IN detinue of charters law-wager was allowed (*e*); notwithſtanding it was urged, that charters being things relating to the freehold, ought to take the action out of the common courſe, like an obligation upon which an action of debt was founded. In another action, ſome years after, for detaining charters, this matter was argued again, and a difference ſeems to have been taken between a *general* declaration for charters, and one that ſpecified the charters detained; upon which the plaintiff had leave to amend; and, after ſpecifying the charters, the defendant was forced to plead to the country (*f*); though this was of a bailment to the predeceſſor of the defendant, who was dean of a church, which was an additional reaſon for putting it to the country.

(*a*) 28 Ed. III. 100. a. 29 Ed. III. 44. b. (*b*) 30 Ed. III. 4. b. (*c*) 47 Ed. III. 18. (*d*) 49 Ed. III. 3. 43 Ed. III. 1. a. (*e*) 38 Ed. III. 7. a. (*f*) 44 Ed. III. 41. b.

It was held, the law-wager ſhould not lie in debt for recovery of rent, becauſe it was connected with the realty *(a)*. The rent in this caſe conſiſted not in money, but in corn and other things; and the action was laid, not in debt, but as for a *detinet* of thoſe articles; upon which ground it was that the defendant offered his law-wager; and upon the above reaſon it was refuſed.

In an attachment upon a prohibition, the defendant was not ſuffered to wage his law; for it was ſaid, that ſuing in the ſpiritual court was a treſpaſs and contempt of the king's writ and authority, and in ſuch caſe no wager of law could be allowed *(b)*. Notwithſtanding this determination, it was allowed in a ſubſequent caſe, though in another they returned back to the firſt reſolution, and ſo ſettled the law *(c)*. Indeed it was held generally, that no defendant could wage his law againſt the king *(d)*, for which reaſon it was never allowed in the court of exchequer. It was held, that where a teſtator might wage his law, his executors might alſo *(e)*.

Trial by proofs, and other trials.

The trial *by proofs*, which is ſo often mentioned in Glanville and Bracton, continued ſtill in uſe, though its application was extremely circumſcribed. It ſeems to have been reſorted to, only in ſuch caſes where the matter could not, by conſtruction of law, be ſuppoſed to be within the knowledge of the *pais* or country. The moſt common inſtances we meet with of this trial were, where the huſband was alledged to be alive in another county. Thus, in an aſſiſe brought by a woman, *quæ fuit uxor B.* the tenant ſaid, that *B.* was alive in another county, and that he was ready to *prove* it; that is, to put it on the trial by proofs. To this it was anſwered by the other ſide, that this amounted to the iſſue of *covert baron*, which was triable by the aſſiſe; therefore they prayed the aſſiſe might paſs. But it was the opinion of the court, that this point had formerly been always tried by *proof*, and ſo it muſt continue; yet, they ſaid, had the aſſiſe been brought without the plaintiff alledging *quæ fuit uxor B.* it would have been otherwiſe. If a deed of an anceſtor was pleaded againſt me, and I ſaid, that ſuch anceſtor was alive in another county, or beyond ſea; it was the opinion of ſome, that this ſhould be tried by the aſſiſe, and not by *proofs (f)*. In an aſſiſe againſt baron and feme, the baron did not appear, but the wife did, and pleaded the death of the baron in a foreign county; upon which the

(*a*) 50 Ed. III. 16. b. (*b*) 18 Ed. III. 4. a. (*c*) 24 Ed. III. 39. a. 44 Ed. III. 32.
(*d*) 50 Ed. III. 1. (*e*) 29 Ed. III. 36. b. 37. a. (*f*) 36 Aſſ. 5.

plaintiff

plaintiff prayed the aſſiſe, without alledging the baron to be alive in the firſt county: but this creating a difficulty, the juſtices adjourned it to Weſtminſter, where it was adjudged that it ſhould be tried by *proofs (a)*. Again, in an appeal in the king's bench, by a woman, for the death of her huſband, in the county of *B.* the defendant ſaid, that he was alive in the county of *N.* and they had a day given them to bring their *proofs* on both ſides; one to prove the death, the other the life of the party *(b)*. This trial in appeal was conſidered as peremptory; and therefore, if there was a doubt of ſucceeding, they would withdraw that plea, and plead the general iſſue, not guilty *(c)*.

THE foregoing trials were all upon one point: the following was of another ſort. In an aſſiſe there aroſe the iſſue, whether the priory of *D.* was donative and removable, or perpetual; and the Reporter ſays, it ſhould ſeem this ought to be tried by the aſſiſe, and not by *proofs*; becauſe it lay in the knowledge of the *pais*, whether the priors had enjoyed the land all their lives, and acted as lawful owners all that time: but it was ſaid by *Percy*, that, as the prior was a prior alien, and the chief priory was beyond ſea, it ſhould be tried by *proofs (d)*. It may be obſerved, that the formal words by which a party ſignified, that he meant to make out what he aſſerted *per pais*, namely, that he was ready to *verify* it, ſeemed to import a higher confidence in this deciſion than in any other; and again, while the evidence of proofs could no more than *prove* the matter on one ſide and the other, the determination of the jury was called *veredictum*, that is, as it ſhould ſeem, a verity not to be controverted.

THERE were other methods of enquiry, which might be called trials *per proves*, and were the remains of the old juriſprudence. A recovery by default in dower on a *petit cape* was pleaded in an aſſiſe, and the plaintiff ſaid the land in queſtion was not compriſed in that recovery. This was to be tried by the ſummoners and viewers in the firſt action; and if it had been upon a *grand cape*, then by the ſummoners, viewers, and pernors *(e)*. In other caſes, where land was to be identified, there was a mixed trial, conſiſting partly of the *pais*, and partly of proofs; as where, in an aſſiſe, there aroſe an iſſue, whether the land in queſtion was extended, and put in execution under a ſtatute merchant; there proceſs was awarded againſt the extendors to be joined to the aſſiſe to try the iſſue *(f)*. Where a recovery was pleaded in a former aſſiſe before the ſame juſtices, and the plaintiff

(a) 39 Aſſ. 9. (b) 41 Aſſ. 5. (c) 43 Aſſ. 26. (d) 43 Aſſ. 4. (e) 48 Ed. III. 11. (f) 31 Aſſ. 6.

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ſaid they were not the ſame tenements, he put himſelf to prove it *per primos juratores et per alios*, and it was tried in that manner (*a*). And this trial by the former jurors, and by others, was very common where a former recovery was in queſtion (*b*). The practice of joining the witneſſes to a deed to the pannel of jurors, was very antient, and continued ſtill in uſe, as will be ſeen preſently.

ANOTHER mode of trial was by the certificate of the biſhop, who had cogniſance in certain queſtions of a ſuppoſed ſpiritual nature. Much debate had been occaſioned by the conteſts for ſpiritual juriſdiction between the lay and eccleſiaſtical courts. When the grand bounds of theſe two tribunals were ſettled by parliament, and by long uſage, there apparently ſtill remained diſputes about terms, which led into many ſubtle explanations and artificial diſtinctions. Though it was beyond all queſtion, that, in caſes of general baſtardy, matrimony, profeſſion, divorce, and the like, the court chriſtian was to determine; yet it was held, thoſe points might be brought into debate in ſuch a way, as to draw the cogniſance of them from the ſpiritual to the lay tribunal. It depended therefore upon the pleading, and the form of the iſſue, whether it was to be tried by certificate, or *per pais*. So nicely were theſe pretended diſtinctions managed, as not to eſcape ſome charge of contradiction.

IN an aſſiſe by baron and feme, it was ſaid by the defendant, that there had been a divorce between the plaintiffs, and one of them had ſince been married to the defendant; therefore ſhe was the wife of the defendant, and not of the plaintiff. After much debate and argument, it was held, this ſhould be tried by the *pais*, and not by certificate of the ordinary; and this was on account of the concluſion, *et eſſent nient ſon feme (c)*: for if he had reſted upon the divorce only, that being wholly a ſpiritual matter muſt have gone to that tribunal; but the concluſion being a matter *in pais*, brought the whole before the country (*d*). This diſtinction may help to reconcile many of the caſes. Thus, where the iſſue in *quare impedit* was *void*, or *not void*, it was to be tried by the country; but otherwiſe if it had been *full*, or *not full*, for plenarty was to be tried by the court chriſtian (*e*), which alone could judge of it. Where the iſſue was, whether the maker of a deed was profeſſed the day he made it, it was tried by the country; becauſe, though the profeſſion was properly to be tried by the certificate of the ordinary; yet here the pro-

(*a*) 22 Aſſ. 16. (*b*) 40 Aſſ. 4. (*c*) 39 Ed. III. 31. (*d*) 39 Aſſ. 8. (*e*) 40 Ed. III. 20.

feſſion

ſeſſion was admitted, and the doubt was only upon the time when the deed was made (*a*). On the other hand, where impriſonment was alledged in the ordinary's priſon, at the time of the outlawry, it was tried by certificate (*b*). It ſeems, that it had become the practice to try by the country even the direct queſtions of profeſſion, general baſtardy, and the like, if alledged in a perſon who was dead, or a ſtranger to the action. This had been done in ſome poſſeſſory actions, particularly in aſſiſes, where the diſpatch might be thought ſome apology for the innovation; but this was not univerſally approved, and they ſeem to have recurred ſometimes to one tribunal, and ſometimes to another, according to the opinion of different judges (*c*). Upon the whole, the law ſeemed to ſtand thus: That the iſſues of *feme* or *not feme covert*, of *ſole parſon* or *not parſon*, born before eſpouſals or after, and the like points, which were mere temporal facts, were to be tried by the *pais*; but the direct points of general baſtardy, *ne unque accouple in loyal matrimony*, profeſſion, bigamy, divorce, ability in a parſon, and the like matters of ſpiritual cogniſance, were to be tried by the biſhop's certificate. Yet, owing to the forms of ſome actions, as well as to the way of pleading above ſtated, theſe direct iſſues on ſpiritual matters were moſtly avoided. Thus, where a woman demanded land of her own poſſeſſion, or of a poſſeſſion with her huſband, as in aſſiſes, in a *cui in vita*, and other poſſeſſory writs, the iſſue of *ne unque accouple*, &c. could not ariſe: but it was otherwiſe in dower, and appeal *de morte viri*, for there ſhe claimed *through* her huſband (*d*). The nature of poſſeſſory actions was ſuch, that the above iſſues ſeldom aroſe between the parties, but connected with ſuch conſiderations as made them very proper objects to be enquired of by the country; which conſideration was aſſiſted by a general propenſity rather to commit the trial to a jury, than to the eccleſiaſtical court.

Trial per pais.

In proportion as any of the foregoing trials gave way, the trial by the country ſucceeded in its place, and became every day more common. As it grew more frequent, its nature and properties were more diſcuſſed and better underſtood, and the rules by which it was to be governed became ſettled upon principle. The learning about this mode of trial, conſiſted in the qualifications of the jurors, the manner of giving their verdict, and the ſubject matter that was within their cogniſance.

(*a*) 44 Aſſ. 10. (*b*) Bro. Triall 140. (*c*) 38 Aſſ. 30. 41 Ed. III. 37. 42 Ed. III. 8. (*d*) 40 Aſſ. 17. 40 Ed. III. 25. 49 Ed. III. 18. 50 Ed. III. 19.

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THE idea of jurors being of the vicinage where the fact to be tried had happened, was in ſome meaſure given up; for they were now to enquire for the whole of the county, and it was ſufficient if there were two of the hundred to inform the reſt: however, it was a good cauſe of challenge if there were no hundredors (*a*). If the venue was awarded out of two counties (as it was in ſome caſes), each ſheriff was to return twenty-four jurors, and there ought regularly to be ſix of each upon the inqueſt; tho', ſhould it appear upon examination of the jurors that there were not ſix in town, the inqueſt might be ſupplied from others (*b*). In all caſes where there were not ſufficient of the jury returned, after defaults or challenges, the plaintiff might pray a *tales*, as it was called, to the amount of ten, but not further (*c*); for tho' *decem tales* was common, ſays the book, we never heard of *undecim tales:* notwithſtanding in an attaint, eighteen *tales* were allowed to make up the jury of twenty-four (*d*). Where an aſſault happened in Weſtminſter-hall, and it was proſecuted by bill in the king's bench, a jury was awarded of thoſe perſons who kept ſhops in the hall (*e*). In order that the jury might be beyond all exception, the cauſes of *challenge* were very numerous: theſe were either to the *array*, or to the *polls*. If a juror was nominated by either party, if the ſheriff was *des robes*, as they called it, to either party, theſe were challenges to the array; the ſheriff not being ſuppoſed ſufficiently impartial to return an indifferent jury (*f*). If a juror was a relation, even in the remote degrees, as in the eleventh degree, or if he held lands in leaſe of either party, it was a good challenge to the *poll* (*g*). When ſuch diſtant apprehenſions of favor in jurors were regarded as legal objections, it is eaſy to imagine how much argument might be raiſed on the ſubject of challenges.

A CHALLENGE of the array uſed to be tried by the coroners; and if it was found againſt the ſheriff, the *venire* would be directed to the coroners. A challenge of the *polls* would be tried by two of the jurors already ſworn, if ſo many were ſworn, otherwiſe by ſome perſons *de circumſtantibus* (*h*).

WE have ſeen the method which had got into practice in the time of Edward I. of compelling a jury to agree in their verdict. This authority over jurors ſeems to have been exerciſed by judges with very little ſcruple. Some inſtances of the treatment experienced by jurors in this reign will ſhew the

(*a*) 13 Aſſ. 12. (*b*) 48 Ed. III. 29. (*c*) 47 Aſſ. 11. (*d*) 21 Ed. III. 43. (*e*) 42 Aſſ. 18. (*f*) 38 Ed. III. 25. 49 Ed. III. 1. (*g*) 41 Ed. III. 9. 21 Ed. III. 41. (*h*) 21 Aſſ. 26. 20 Aſſ. 10.

notions

notions entertained by our anceſtors concerning this proceeding. In the eighth year of the king, in a writ of mortaunceſtor, a juror who had delayed his companions a day and a night becauſe he would not agree with them, and this without any good reaſon (as the book ſays), was committed to the *Fleet*, and was afterwards let to mainprize, till the court were adviſed what ſtep to take with him. In the third year, where, in an action of treſpaſs, one of the jury would not agree, the judge took the verdict of the eleven, and committed the twelfth to priſon (*a*). The ſame was done in the twenty-third year (*b*). But the taking a verdict *ex dicto majoris partis juratorum*, tho' conformable with the old practice, began to go out of uſe towards the latter end of this reign; for in the fortieth year, when eleven gave their verdict without aſſent of the twelfth, they were fined by the juſtices (*c*). In the next year this point was debated, and finally ſettled. In an aſſiſe, all the jurors were agreed except one, who would not be brought to concur with them; they were therefore remanded, and remained all that day and the next without eating or drinking, and then, being aſked by the juſtices if they were agreed, the diſſentient anſwered No, and that he would firſt die in priſon; upon which the juſtices took the verdict of the eleven, and committed the ſingle juror to priſon. But when judgment was prayed in the common bench upon this verdict, the juſtices were unanimouſly of opinion, *that a verdict from eleven jurors was no verdict at all*: and when it was urged that former judges had taken verdicts of eleven, both in aſſiſe and treſpaſs, and particularly mentioned one taken in the twentieth year of the king; *Thorpe*, one of the juſtices, ſaid, that it was not an example for them to follow, for that judge had been greatly cenſured for it (*d*); and it was ſaid by the bench, that the juſtices ought to have carried the jurors about with them in carts till they were agreed. Thus it was ſettled at the cloſe of this reign, that the jurors muſt be unanimous in the verdict, and the juſtices were to put them under reſtraint, if neceſſary, to produce ſuch unanimity. If the jurors, when committed to the care of the ſheriff, ate or drank or went at large, the verdict was void, and the party might have a new *venire* (*e*). It happened, when a jury were put together to conſider of their verdict, one of them ſecretly withdrew himſelf: for this contempt he was fined and impriſoned, and another ſworn in his place (*f*). This compulſory power over the jurors extended even to the

(*a*) Fitz. Verd. 40. (*b*) Bro. Jurors 53. (*c*) 40 Aſſ. 10. (*d*) 41 Aſſ. 11.
(*e*) 4 Ed. III. 24. (*f*) Bro. Jur. 46.

pannel;

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pannel; for where a falſe return of jurors was made by the bailiff of a franchiſe, the juſtices reformed the pannel (*a*).

To relieve themſelves from the difficulty of deciding, the jurors might find their verdict *at large*, as it was called; that is, they might ſtate the ſpecial circumſtances, and leave it to the diſcretion of the court to make the concluſion thereon: and they might do this, as well on a ſpecial as a general iſſue (*b*.) In ſuch verdicts, it was not uncommon for the jury to find *fines*, and other matters of record; for though they could not be compelled to find matters of record, they might, if they ſo pleaſed (*c*).

THERE was great doubt, how far the jurors might take cognizance of matters that happened out of the county; nor does there ſeem to have been any principle yet agreed upon, which would enable one to pronounce with confidence as to the general law upon this point. Perhaps, the diſtinct juriſdiction between counties depended much on the ſame ſort of reaſoning as that between the ſpiritual and temporal courts; ſo that though the jury of one county could not find a fact which was *neceſſarily* of a *local* nature, and had happened in another county, yet they might judge of matters that were only *accidentally* ſo, or dependent upon ſuch local fact. Thus it was held, that the jurors in aſſiſe could not find a *dying ſeiſed* in another county, but they might have found the *dying* ſimply (*d*). It may be obſerved, that the general propenſity of courts was, to confine jurors to the cognizance only of ſuch things as happened within their own county.

IF there was any doubt concerning the competency of the jurors of one county to take notice of facts happening in another, there was not leſs difficulty in deciding from what county the jurors ſhould be choſen to try an iſſue when joined. It was uſual in pleading, for the parties to alledge the locality of facts conformably with the real truth; ſo that in the courſe of pleading, two or more different counties might be mentioned as the places where ſeveral ſcenes of the tranſactions in queſtion had paſſed. When a fact was ſaid by one party to have happened in the county of *A.* and by the other in the county of *B.* and the writ perhaps had been brought in the county of *C.* it required ſome technical diſtinctions to aſcertain whence the jurors ſhould be brought to try the fact in diſpute. One ſort of reaſoning

Of the venue.

(*a*) 41 Ed. III. 26. (*b*) 22 Aſſ. 60. 38 Aſſ. 9. 18 Aſſ. 3. 30 Ed. III 23. & paſſim.
(*c*) Bro. Jur. 39. 26 Aſſ. 50. (*d*) 1 Aſſ. 16.

prevailed

prevailed at one time, a different one at another; and there ſeems to have been very few caſes where any fixed rule was laid down, to govern the court in awarding the *venire facias* to one county or another.

It was repeatedly debated, whence the vicinage ſhould come to try the iſſue of villenage. It ſeemed natural to try this by the vicinage where the villenage was alledged to be, and ſo it was in the old law. We find in the 39th of the king, that practice ſtill continued; for being at iſſue, whether the demandant was a villain regardant to the manor of *T.* in the county of *N.* or a baſtard; and the manor was in one county, and his birth alledged in another; the venue was awarded in the county where the manor was (*a*). But in the next year, when an iſſue aroſe like the former, the venue was not awarded where the manor lay, but where the writ was brought (*b*). Again, in the 43d year, an iſſue of villenage ariſing, the venue was awarded where the manor lay, and not where the birth was alledged (*c*). Yet the next year, they ſeemed to have returned back to the practice of the year 41; and that ſeemed to be relied upon as the better opinion (*d*). But in the 47th year, the court were ſtill in doubt; and, in order to ſettle the practice, they ſuſpended the iſſue of the *venire* till they had conſulted parliament, whether the *venue* ſhould be of the county where the villenage was alledged, or where the writ was brought (*e*). What was the reſult of this application of the judges, we do not know; but in the 50th year there was a petition to parliament, praying, that where-ever a queſtion aroſe concerning a man's birth, in pleas of freehold or inheritance, the inqueſt might be of the county where the birth was laid, and not where the writ was brought; but this petition was rejected (*f*).

The two guides for ſettling the venue ſeemed to be the *land*, and the *fact* alledged; and when the balance was thought to ſtand equally between them, there was ſometimes a venue from both. Where it was indifferent, the venue naturally came from the county where the writ had ſuppoſed the tranſaction. All this will be better underſtood by ſome examples. In the firſt place, of *land*. It was ſettled, that in debt for rent on a leaſe for years, if any fact, as payment, an agreement, or the like, was alledged

(*a*) 39 Ed. III. 36. (*b*) 40 Ed. III. 36. (*c*) 43 Ed. III. 4. (*d*) 44 Ed. III. 6.
(*e*) 47 Ed. III. 26, 27. (*f*) Cott. Abrid. 50 Ed. III 152.

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in another county, it ſhould notwithſtanding be tried where the land lay (*a*), although there was an iſſue upon the very deed granting the leaſe (*b*). In *per quæ ſervitia*, non-tenure was pleaded; and though the manor was in *N.* and the writ brought there, yet, the land being in *S.* the venue came from thence (*c*). Secondly, as to the *fact*. In a writ of annuity, where the ſeiſin was alledged in a different county from that where the land lay and that where the writ was brought, the venue came from the county where the ſeiſin was alledged (*d*). In debt by an adminiſtrator, the defendant pleaded, that the deceaſed made executors, and died in a foreign county; the plaintiff replied, that he died inteſtate; here the venue was in the foreign county (*e*). A releaſe was pleaded; the venue was, where the deed bore date, and not where the land lay (*f*). In a plea of covenants performed in a foreign county, the venue was from thence; and this was laid down as a general rule (*g*); but not ſo where conditions were pleaded, and alledged at another place (*h*). If impriſonment was pleaded, the venue was to come from whence it was alledged (*i*). In an action of debt, there was a plea of a bailment in pledge at *L.* the venue was awarded from *L.*; and in dower, where the tenant pleaded elopement of the demandant from her huſband at *D.* in the county of *S.* and reſiding with the adulterer in *London*, the venue came from London (*k*). In accompt, the defendant pleaded infancy at the time of the receipt, and ſaid, that he was born at *B.* in another county; but the venue came from the county where the receipt was alledged (*l*). Again, in *quare impedit*, upon diſability pleaded, the plaintiff ſaid he was examined at *D.* in the county of *C.* and the writ was brought in *D.* but the venue came from *C.* (*m*). When the venue was governed by the fact, it always followed the plea of the defendant, and not the replication; as where the defendant ſaid, that the plaintiff and others took away his wife in the county of *K.* and there detain her; the plaintiff replied, that ſhe was at large in *C.*: here the venue came from *K.* (*n*). So when the tenant pleaded a warranty in the county of *S.* and the plaintiff replied, that the warrantor was ſtill alive in *D.* the venue was from *S.* (*o*); theſe being caſes where the fact alledged by the defendant would in ſubſequent times have been traverſed, and ſo brought directly in iſſue.

(*a*) 44 Ed. III. 42. 45 Ed. III. 3. (*b*) 45 Ed. III. 8. (*c*) 21 Ed. III. 18. (*d*) 49 Ed. III. 5. 48 Ed. III. 26. (*e*) 44 Ed. III. 16. (*f*) 44 Ed. III. 34. (*g*) 44 Ed. III. 42. (*h*) 45 Ed. III. 15. (*i*) Ibid. (*k*) 46 Ed. III. 30. 47 Ed. III. 25. (*l*) 21 Ed. III. 7, 8. (*m*) 39 Ed. III. 2. (*n*) 11 Aſſ. 7. (*o*) 11 Aſſ, 18.

A RE-

A REPLEVIN was brought in Middleſex, the defendant avowed for homage; the plaintiff pleaded tender of homage in the county of Suſſex, and the venue was awarded in that county (*a*). Where there was eloignment in one county, and receipt in another, and iſſue was joined on the receipt, the venue was in the county where the receipt was alledged (*b*). In an aſſiſe of rent, upon the iſſue of *ne charga pas*, the venue came from the county where the deed was made; which was ſaid to be a conſtant rule where *non eſt factum* was pleaded (*c*). Yet, in a *quare impedit*, it was doubted whether the deed of grant of the advowſon ſhould be tried where it was made, or where the church was (*d*).

THE following were inſtances where a venue of two counties was agitated or awarded. In an aſſiſe, they were at iſſue on a ſpecial baſtardy, and the eſpouſals and birth were alledged in a foreign county. There ſeemed an inclination to try it by a venue of both counties (*e*); but in the next year a baſtardy alledged in a foreign county was tried by the aſſiſe (*f*). Yet in the ſame year, where a baſtardy was alledged in an aſſiſe, it was tried by a *venue* of both counties, though not without long argument (*g*). And thus ſtood the law as to baſtardy at the cloſe of this reign. In treſpaſs in the county of *E.* the defendant juſtified for common appendant to land in the county of *W.* and the venue was awarded of both counties (*h*). Where treſpaſs was laid in *B.* againſt two, and one defendant pleaded not guilty, and the other a releaſe at *A.* there was a venue of both counties (*i*). Again, where a releaſe was pleaded, and it was replied, that he was within age when he executed it, the venue was awarded both of the county where the deed was made, and where he was born (*k*). As a venue might be had out of two counties, ſo might it out of two diſtricts, or ſmaller juriſdictions. In an aſſiſe of common in one franchiſe, appendant to land in another franchiſe, the jurors were to come from both the franchiſes; and it was ſaid, the aſſiſe could not be taken by the men of one franchiſe alone, any more than in an aſſiſe in *confinio comitatûs*, which could not be taken by the men of one county only (*l*). Again, in an appeal of mayhem in the ward of *Cheap*, the defendant pleaded *ſon aſſault demeſne*, and in his own defence, in the ward of *Cornhill*; and the venue came from both wards (*m*).

(*a*) 21 Ed. III. 11. (*b*) 21 Ed. III. 48. (*c*) 26 Aſſ. 3. (*d*) 43 Ed. III. 1.
(*e*) 45 Aſſ. 12. (*f*) 46 Aſſ. 3. (*g*) 46 Ed. III. 6. (*h*) 49 Ed. III. 19.
(*i*) 50 Ed. III. 1. (*k*) 38 Ed. III. 17. (*l*) 30 Aſſ. 42. (*m*) 41 Aſſ. 21.

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If no venue was laid in the plea (which ſometimes, though not often, did happen), it was taken to be in the county alledged by the plaintiff (*a*). The option of the plaintiff to chuſe the county in which he would bring his action ſeemed of little value; for if he laid it in a foreign county, he might be brought back, by the pleading of the defendant, to try it in the right one: Or if he brought it in the true county, ſome juſtification or diſcharge might be ſet up, which would carry the trial to another; the conſequence of which was, that there was leſs debate about the venue which the plaintiff choſe for his declaration. There are, however, ſome determinations upon that point. It was held, that an action of accompt againſt the bailiff of a manor ſhould be brought in the county where the manor was: detinue might be brought either where the detinue was, or where the bailment was alledged. *Warrantia cartæ* might be brought in another county than that where the land lay (*b*). An action on the ſtatute of labourers might be brought either where the retainer was, or where the departure of the ſervant was alledged (*c*). An attachment on a prohibition was to be brought where the ſummons to appear had been ſerved (*d*). Where a perſon was taken in one county, and carried into another, it was ſaid, there might be ſeparate actions of falſe impriſonment: the ſame where a diſtreſs was taken in one county, and carried into another (*e*). A *quare impedit* was to be brought where the preferment lay that was in queſtion; but we find the king brought a writ in a foreign county, and it was held well (*f*). Forfeiture of marriage was to be brought where the tender was (*g*); a writ of ward in the county where the land lay (*h*).

Whenever the witneſſes to a deed were joined with the jurors, they ſo far differed from the pannel, that they could not be challenged, nor was their concurrence neceſſary to complete the verdict (*i*). It was a rule, that the jurors ſhould be exempt from attaint, if the witneſſes agreed with them; but if they diſſented, the jurors were liable as in other caſes. Proceſs might be had againſt witneſſes, even where a deed was not denied directly, but the iſſue was upon the effect and conſequence of it; as, *il ne charge pas per le fait, ne releaſa pas,* and the like (*k*).

(*a*) 21 Ed. III. 10. (*b*) 40 Ed. III. 4. (*c*) 41 Ed. III. 1. (*d*) 42 Ed. III. 14. (*e*) 38 Ed. III. 34. (*f*) 21 Ed. III. 5. 4 Ed. III. 9. (*g*) Fitz. Viſne, 4. (*h*) 31 Ed. III. 42. (*i*) 12 Aſſ. 12. 23 Aſſ. 11. (*k*) 23 Aſſ. 11. 43 Ed. III. 2. 41 Aſſ. 23.

Of proceſs.

VERY little has yet been ſaid on the proceſs of *capias*, and writs of execution: the latter are hardly mentioned by Bracton, and it was of late that the former had become of much uſe. We have ſeen that the writ of *capias*, being a proceſs of contempt (*a*), did not iſſue without the ſpecial award of the court; and in granting it, whether in caſes where it lay at common law, or where it had been ordained by the late ſtatutes, the court exerciſed a diſcretion according to the circumſtances of the cauſe. In an action for a bag of charters, it was ſaid, that this was a matter of too little importance to award a *capias*, and therefore it was denied (*b*). The bag, and not the charters, being the only pretence for the writ, they thought themſelves juſtified if they were governed by the value of that, without any regard to the importance of the charters; for theſe being conſidered as chattels *real*, were not, they ſaid, ſuch chattels a detinue of which could entitle the plaintiff to a *capias*, under the ſtatute of this king. Again, in an action of treſpaſs againſt an innkeeper for goods which a gueſt loſt while in his inn, the court would not award a *capias* upon the judgment, though the writ was *contra pacem*; ſaying, that it was found by the jury to be only negligence; and a man was not to be taken and ſent to priſon for negligence only, where he had committed no *tort* (*c*). It ſeemed to be held, that where the defendant appeared upon the *diſtringas* in the meſne proceſs, he was not liable to a *capias ad ſatisfaciendum* upon the judgment, but only a *diſtringas ad ſatisfaciendum* (*d*): And a *capias* in no caſe was allowed againſt an archbiſhop, biſhop, abbot, or prior, nor againſt an earl, baron, or knight, becauſe it was preſumed they muſt have ſufficient whereby they might be diſtrained (*e*).

THE common writs of execution were *elegit*, *fieri facias*, and *capias*; beſides that abovementioned of *diſtringas ad ſatisfaciendum*, where the defendant was to be compelled to make ſpecific redreſs, as in detinue. It was ſettled, that a *capias* might be had after a *fieri facias*, and a *nihil* returned (*f*). But after taking the body, no *fieri facias* nor *elegit* could be had, the perſon of the defendant being conſidered as a full execution (*g*); nor could the body be taken after an *elegit* (*h*). An *elegit* might be ſued into as many counties as the plaintiff pleaſed (*i*). As the land was bound from the time of the judgment only, an application had been made to parliament, that it might be bound from the date of the original writ; but the law was not altered (*k*). Upon an *elegit*, all chattels were to be levied, under which were included (as we

(*a*) Vid. ant. (*b*) 42 Ed. III. 13. (*c*) 42 Ed. III. 11. (*d*) 49 Ed. III. 2. (*e*) O. N. B. 61. (*f*) 45 Ed. III. 19. (*g*) 22 Aſſ. 43. (*h*) 50 Ed. III. 4. (*i*) 47 Ed. III. 26. (*k*) Cott. Abrid.

have

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have ſeen) a leaſe for years, lands in ward, or in execution under a ſtatute (*a*). A gift of goods after judgment was void, and the officer might levy them under an *elegit*, or *fieri facias*, notwithſtanding any ſale or gift, they being bound by the judgment (*b*). A perſon taken upon a *capias ad ſatisfaciendum*, was not to be ſuffered to go at large, though he had found mainpernors: the ſame, if he was charged on a *capias pro fine* (*c*); and if he eſcaped, another *capias* might be had, as well as an action againſt the gaoler (*d*). The eſtabliſhed practice was, upon the return of the firſt *capias ad ſatisfaciendum*, to iſſue an *exigent*, and ſo on to outlawry.

SEVERAL ſtatutes were made in the reign of Edward I. to enforce the execution of proceſs, and to puniſh the neglects of ſheriffs, or bailiffs in ſerving it. In the time of Henry III. it had been uſual to amerce ſheriffs for omiſſions and defaults of that ſort; but the method of levying ſuch amercements does not appear. It had now got into practice to deal with theſe officers in a more ſummary way; for the courts uſed to iſſue proceſs to the coroners to *attach* the ſheriff, and according to the nature of the caſe he uſed afterwards to be amerced (*e*). Where an under-ſheriff, having the charge of jurors, had ſuffered them to eat and drink, and to go at large, a *capias ad reſpondendum* was awarded againſt him, out of the king's bench (*f*).

THOUGH we have met with ſeveral ſtatutes (*g*) for reſtraint of writs of protection, there has not yet occurred any particular mention of them, ſo as to enable us to ſtate what they were. The two principal writs of protection were diſtinguiſhed by the clauſe of *nolumus*, and *volumus*. The latter was the moſt general and moſt ample. It was uſually obtained by perſons going (or pretending to go) out of the kingdom in the ſuite of ſome great man, on the king's ſervice; and it was under the great ſeal. The writ (or letters patent) was directed to all bailiffs and others, ſignifying, that the king had taken the bearer and all his lands and goods into his protection *quià profecturus*, &c. becauſe he was going out of the kingdom on the king's affairs; and they were commanded accordingly to ſee that his perſon and property were protected from all harm or injury; which protection was to laſt to a certain time therein mentioned. Then there followed this clauſe, *Volumus etiam*, &c. ſignifying, that he ſhould be free from all pleas and plaints, except pleas of dower, *unde nihil*, *quare impedit*, aſſiſe of novel diſſeiſin, darrein preſentment, and attaint, and certain other pleas ſummoned before the juſtices in eyre. The protection *cum clauſula nolumus*, was of a more confined nature: it was only

(*a*) 31 Aſſ. 6. (*b*) 22 Aſſ. 72. (*c*) 22 Aſſ. 74. (*d*) 26 Aſſ. 51. 41 Aſſ. 15.
(*e*) 43 Ed. III. 26. 47 Ed. III. 28. (*f*) 24 Ed. III. 24. (*g*) Part I. 461.

had

had in caſes where a perſon was in apprehenſion that the king, or ſome common perſon, might take his corn, hay, horſes, charters, or the like; and it might be granted by any maſter in chancery, without a privy ſeal, which was neceſſary to obtain the former. The clauſe from which the writ was named, was, *Nolumus,* &c. ſignifying the king's pleaſure, that no one ſhould preſume to take the property of ſuch perſon protected (*a*).

The crime of treaſon.

We ſhall now conſider ſuch alterations as were made in the criminal law during this reign. The crime of treaſon was brought to ſomewhat more certainty by the famous ſtatute made in the 25th year of this king. All the treaſons enumerated in that act were conſidered as treaſons before; and many that are not there mentioned, were, however, ſtill continued by the courts to be conſtrued treaſons, notwithſtanding the ſtrict injunction of that act. In order to ſet this ſubject in a true light, we ſhall firſt mention ſuch caſes of treaſon in this reign as happened before, and then ſuch as happened after that act.

In the 12th year of the king, a girl of thirteen years old killed her miſtreſs, and was burnt; which ſhews that it was conſidered as a treaſon (*b*); ſo that killing a miſtreſs was held equally criminal with killing a maſter. The puniſhment of ſuch an offender was, to be drawn and hanged without any benefit of ſanctuary (*c*). How conformable the ſtatute of treaſon was with the common law as it then ſtood, may be judged by the following paſſage of a report in the 22d of the king, which was the year when the petition was firſt preſented to the parliament for the declaration of treaſon. Treaſons that touch the perſon of the king are there inſtanced as follows: Imagining his death, according with his enemies, falſifying his ſeal, counterfeiting his money, and the like; ſo that coining was conſidered among the higher order of treaſons, as ſtated by *The Mirror*, though it had been otherwiſe in the earlier times of our law. In all theſe treaſons, on account of their heinous nature, and their near connexion with the royalty, the law allowed no perſon but the king to derive any emolument from them; and therefore he had the forfeiture of lands and goods. But where a maſter was killed by his ſervant, and in other inferior treaſons, the eſcheat belonged to the lord of whom the offender held his land; all which correſponds with the language of the ſtatute of treaſons. The caſe in which the law was ſo laid down was, where a perſon was indicted for killing a king's meſſenger; which, on that occaſion, was held to be of the higher order of treaſons (*d*).

(*a*) O. N. B. 21. (*b*) 12 Aſſ. 30. (*c*) 21 Ed. III. 17. (*d*) 22 Aſſ. 49.

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AFTER the ſtatute of treaſons we find the following caſes: A ſervant departed out of his ſervice, and a year afterwards killed his former maſter, upon a malice that he had conceived againſt him while in his ſervice; and for this he was drawn and hanged (*a*). *Shard*, who was the judge on this occaſion, forbad, under pain of impriſonment, that any one ſhould furniſh the priſoner with a hurdle or other thing to be drawn upon; but directed that he ſhould be dragged by horſes out of the hall where judgment was paſſed, to the gallows. Thus *drawing* was a ſerious part of the ſentence. In the 38th year it was held, that adhering to the king's enemies in Scotland was only felony, and not treaſon (*b*); for what reaſon it is difficult to ſay. However, where a Norman was captain of an Engliſh ſhip containing ſeveral Engliſhmen, and they committed many robberies on the ſea; it was held by *Shard*, that, inaſmuch as the former *did this in the Norman tongue*, it was only felony in him; but in the others, *who did it in Engliſh*, as the Report expreſſes it, the fact was treaſon. This caſe is very remarkable: firſt, as it was neither expreſly within the ſtatute of treaſons, nor declared by the advice of parliament: ſecondly, as it was upon the high ſeas; from which it ſhould ſeem that the admiralty as yet did not exiſt, or at leaſt affected no juriſdiction of that ſort (*c*). The above caſe was held for law by the court; and it was at the ſame time agreed, that where a ſervant procured another to kill his maſter; as this, if committed, was only felony in the principal, it could not be treaſon in the acceſſary.

Homicide.

THE ideas of homicide which prevailed in the time of Bracton, ſeemed ſtill to govern (*d*). This was particularly obſervable in what was called homicide *ſe defendendo*, where the defendant was required to make out the abſolute neceſſity he was under to act in his own defence. Where one purſued another with a ſtick, and ſtruck him, and the perſon ſtricken again ſtruck the purſuer, of which blow he died; here, becauſe it was proved that the perſon killing might have fled, but would not, rather chuſing to aſſault the purſuer, it was held to be felony (*e*). Where the deceaſed had thrown the defendant to the ground, and drew his knife to kill him, and the defendant, while upon the ground, alſo drew a knife, upon which knife the deceaſed, in a hurry to do the act, fell, and was killed; this was held not homicide *ſe defendendo*, but no felony at all, the death having followed from the motion of the deceaſed himſelf. This diſtinction was material to the de-

(*a*) 33 Aſſ. 7. (*b*) Bro. Cor. 36. (*c*) 40 Aſſ. 25. (*d*) Part I. 308. (*e*) 43 Aſſ. 31.

fendant;

fendant; for notwithſtanding *ſe defendendo* was a killing under an abſolute neceſſity in defence of one's ſelf or property, it was ſtill homicide, and the goods were forfeitable upon conviction. So was it held at common law; and as the ſtatute of Gloceſter (*a*) had only ordained that the convict ſhould have a charter of pardon, the forfeiture remained as before (*b*).

In reſpect of homicide when committed in defence of a man's property, it was held, that where a thief aſſaulted a man, and purſued him, if he killed the thief, the killer ſhould go quit (*c*). Again, where it was proved that the deceaſed and another came to the houſe of the defendant with a deſign to burn it, and the defendant, being then at home, ſhot an arrow and killed the deceaſed; this was adjudged not to be felony. It was at the ſame time ſaid, that where a thief had killed a merchant, and the merchant's ſervant came ſuddenly upon the thief who had robbed his maſter, and killed him, it was not felony (*d*). It will be ſeen preſently, that ſuch killing was ſometimes eſteemed *juſtifiable*.

Most of the foregoing were caſes of homicide which Bracton calls *ex neceſſitate*. We ſhall now conſider ſuch as he denominated, *ex juſtitiâ*. This was, when the killing happened in the execution of lawful proceſs. And here the defendant, inſtead of pleading not guilty, might ſtate the ſpecial matter in the way of a juſtification; and if it was proved true, he went quit, without a charter of pardon. In ſuch caſe of juſtification the jury were charged to find if the thief, againſt whom the proceſs was directed, could have been otherwiſe taken; ſo ſtrictly did they require, even in *juſtifiable* homicide, that a plain *neceſſity* ſhould be made out to warrant the killing. It was at the ſame time ſaid, that a man might in many caſes *juſtify* a killing; as, where thieves come to rob a man, or burglariouſly to break a houſe, they may ſafely be killed, if they could not be otherwiſe taken: the ſame of a gaoler, if he has a weapon in his hand, and is attacked by his priſoners (*e*): ſo that it ſhould ſeem, the killing a thief or a burglar, if he could not otherwiſe be taken, was not homicide *ſe defendendo*, but juſtifiable. In reading our old writers on criminal law, it ſhould be remembered, that they make a diſtinction between homicide *ſe defendendo* from neceſſity, and *ſe defendendo* juſtifiable; the former being felony, the latter none at all.

There was no allowance in our old criminal law for the infirmities and

(*a*) Part I. 402. (*b*) 44 Ed. III. 44. 21 Ed. III. 17. (*c*) 26 Aſſ. 32. (*d*) 26 Aſſ. 23. (*e*) 22 Aſſ. 55.

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paſſions of men. A killing, if in a quarrel or ſudden fray, was equally felonious with any deliberate act of killing: it was ſo in Bracton's time, and ſo it ſtill continued: therefore, where two men were fighting, and another interpoſing to part them was killed by one of them; to adjudge this felony, was perfectly conſonant to the notions of law that had long prevailed (*a*). In Bracton's time it was held, that to procure an abortion, after the fœtus was formed and animated, was homicide: they now began to think otherwiſe. A man beat a woman big with two children, of which one then died; the other was born alive, and baptiſed, but died two days after of the injury it had received; and all this was ſtated in an indictment: but it was held by the court not to be felony (*b*). It was the governing opinion all thro' this reign, that to kill a child *in ventre ſa mere* was not felony; the reaſon given for it being, that ſuch a child could not properly be ſaid to be *occiſus*, as it never was *in rerum naturâ* (*c*); tho' the ſame reaſon would not apply to one that was born, and died of the injury it had received *in ventre*, as in the foregoing inſtance.

The practice was, if a jury acquitted a man of homicide, to direct them to find *who* was guilty of the killing (*d*), in order that ſo heinous a crime might not go unpuniſhed. We find where a man was indicted for the death of another, when the jury had acquitted him, and they were directed to ſay *who* killed the deceaſed, they ſaid that he was in a paſſion, and fell upon his knife, and ſo killed himſelf (*e*). It was common to indict a perſon *de morte ignoti*, which was held ſufficient; but in an appeal, the name of the deceaſed was always to be mentioned; the latter being a ſuit that belonged only to the relations, who muſt of neceſſity know him; the former being a preſentment by the jurors for the king, without any knowledge of the deceaſed (*f*). There is an opinion, that perſons outlawed for felony, as they were *capita lupina*, might be killed by any body; though Bracton lays it down otherwiſe (*g*); and ſays, that even where a ſentence of law was not executed in due order, it was an offence (*h*). Very early in this reign we find a perſon arraigned for killing an outlaw for felony (*i*). It is probable, that the ſlayers of ſuch unhappy objects went without puniſhment, rather from ſome peculiarity in the circumſtances of proſecutions then in uſe, than from any principle of law authoriſing ſuch barbarity. The heir of a perſon ſo outlawed could not have an appeal, becauſe of the corruption of blood;

(*a*) 22 Aſſ. 71. (*b*) 3 Aſſ. 2. (*c*) 22 Aſſ. 94. (*d*) 21 Ed. III. 17. (*e*) 37 Aſſ. 13. (*f*) 1 Aſſ. 7. 22 Aſſ. 94. (*g*) Part I. 318. (*h*) Part I. 308. (*i*) 2 Aſſ. 3.

and

and therefore, till the time of Henry III. when the proceeding *per famam patriæ* became more common, and now *indictments* were preferred almoſt as frequently as appeals, there was no regular method of bringing ſuch offenders to juſtice. However, we find ſo low down as the 27th year, in an appeal of death by a woman, the huſband's outlawry for felony was pleaded, and, though over-ruled, a caſe was mentioned where it had been allowed (*a*).

Larceny.

THE crime of *furtum*, or *larceny*, as it was now commonly called, began to be more minutely explained. The new learning upon this head related either to the things taken, or the mode and circumſtances under which they were taken. A foreſter was indicted *quòd felonicè ſuccidit et aſportavit arbores, &c.* upon which indictment the juſtices refuſed to arraign him, becauſe the trees were annexed to the ſoil, and ſo not *moveables corporeal*, as they were required to be by *The Mirror* (*b*); and therefore felony could not be committed of them even by a ſtranger, much leſs by the foreſter, who had the cuſtody of them. As to the trees being annexed to the freehold, it was ſuggeſted, that it would be different, if they had been cut by the lord, and *afterwards* taken away by ſome one (*c*). It was held, that doves, fiſh, and other things, being *feræ naturæ*, were not ſuch things as a man ſhould ſuffer death for taking them; *niſi* (ſays the book) *fuerunt felonicè furata extra domum vel manſionem* (*d*). A perſon who lived a ſervant in a houſe got up in the night, took ſome things out of a chamber into the hall, with intent to take them away; and going to the ſtable for his horſe, was ſtopt by the oſtler: this was adjudged a ſufficient *taking* to make it a larceny (*e*). Taking away a woman with the goods of her huſband upon her, was held a felony of the goods, if it was againſt the woman's will; though it ſhould ſeem to be otherwiſe, if ſhe conſented to the going away (*f*). There appears to have been a difference of opinion about the offence of receiving ſtolen goods. A man was appealed by a provor, *quòd receptavit latrocinium ſciens de felonià illâ, &c.* and the juſtices would not put him to anſwer; though *Shard* ſaid, that *Scrope* uſed to puniſh ſuch offenders (*g*). It was laid down, that *theftbote* was not when a man took his own goods from a thief, but only when he accepted the thief's goods, in order to favour and ſcreen him (*h*).

WE have ſeen in the reign of Edward I. (*i*) there was a difference of opinion as to the ſum which conſtituted grand or petty larceny. It was

(*a*) 27 Aſſ. 41. (*b*) Vid. ant. (*c*) 12 Aſſ. 32. (*d*) 22 Aſſ. 95. (*e*) 27 Aſſ. 39.
(*f*) 13 Aſſ. 6. (*g*) 27 Aſſ. 69. (*h*) 42 Aſſ. 5. (*i*) Part I. 485.

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ſaid by *Thorpe*, in the 22d year of the king, that a man ſhould be hanged if he ſtole 12d. to which the Reporter adds, *Dixit tamen, quòd laici dicunt* QUE NON *niſi ſumma excedat* 12*d.* (*a*). That the vulgar opinion differed from that of lawyers, appears plainly from the verdicts of juries, who, when they found a man guilty of the fact, and yet wiſhed to make it petty larceny, in order to make ſure of being right, they would find the goods to be worth only *ten-pence* (*b*); though the better opinion ſeemed not to be that of *Thorpe*, but what he attributed to the lay gents, which correſponds with the ſtat. Weſtm. 1. (*c*). A conviction of petit larceny produced a forfeiture of goods (*d*); and the puniſhment was, to be ſent to priſon *daver penance* (*e*), which probably meant no more than cuſtody and confinement.

Burglary.

BURGESSOURS, as they were called by Britton (*f*), or *burglars*, as they were now called, are in this reign deſcribed ſomewhat differently from that author. He ſeems to include the circumſtance of ſtealing as a requiſite to conſtitute the crime; but in the 22d year of this king they are deſcribed as thoſe "who feloniouſly in time of peace break houſes, churches, walls, or "doors; for which burglary" (ſays the book) "a man would be hanged, even "tho' he took nothing (*g*)." Thus the offence conſiſted in the violence done to a man's houſe, and not to his other property, for it carried in it no idea of ſtealing. Again, *robbery* conſiſted principally in the violence done to a man's perſon; for if only a penny was taken, yet the robber would nevertheleſs be hanged (*b*).

RESPECTING all theſe offences, it muſt be obſerved, that the intent was conſidered equally criminal with the fact; and perſons were often executed, who had actually committed no offence. It was ſaid by *Shard*, in the 27th year of the king, that a perſon taken *deprædando vel burgulando* ſhould be hanged, though he did not put in execution his deſign: the ſame of a man who aſſaulted with intent to rob, though he took nothing (*i*). This notion was of very ancient date, and prevailed all through this reign. When common offenders were purſued with ſuch violent preſumptions, the ſeverity with which ſtate-crimes were proſecuted cannot be wondered at. The ſtatute of treaſons ſeems only to have put treaſons upon the ſame foot with felonies; as ſuch delinquents were, by that ſtatute, not to be convicted, unleſs they had ſignified their intent by ſome manifeſt *overt* act, like that of *deprædando* or *burgulando* in a felon.

(*a*) 22 Aſſ. 39. (*b*) 18 Aſſ. 1. (*c*) Part I. 389. (*d*) Bro. Cor. 219. (*e*) 18 Aſſ. 1.
(*f*) Part I. 485. (*g*) 22 Aſſ. 95. (*b*) 22 Aſſ. 39. (*i*) 27 Aſſ. 38.

NOT

Not only thoſe who attempted, or actually committed, the above offences, but thoſe who were accomplices thereto, called *acceſſaries*, were ſubject to the animadverſion of the law. Little is ſaid on the ſubject of *principal and acceſſary* by Bracton. Some deciſions in this reign give an inſight into the diſtinct characters of theſe two degrees of offenders. If a man received a felon, ſo as to aid or favour him in his felony, he became an acceſſary; but if he aided him *per bon parol, cu ſuiſt*, or ſent letters, for his deliverance, this did not make him an acceſſary *(a)*. The idea of acceſſary was carried very far; for if an acceſſary was received by any one, ſuch receiver became acceſſary to the acceſſary, and might be appealed as ſuch *(b)*. A man might be tried as acceſſary where he had been acquitted as principal; for where a perſon on a plea of not guilty was acquitted, he was afterwards indicted for receiving the man who had committed that ſame felony, after he had been outlawed for it; and he was arraigned, and obliged to plead to it *(c)*: for it was ſaid, his acquittal could have no effect to diſcharge him of an offence which he had committed ſince. It was a general rule, that an acceſſary ſhould not be put to anſwer in any caſe of felony, till the principal was attainted; and this was the practice all through this reign *(d)*. Every precaution was uſed to prevent the acceſſary being tried for an offence, before it was proved that the principal had committed it; to avoid the abſurdity of making a man acceſſary to a crime which did not exiſt, or at leaſt had not been proved on the principal. For the ſame reaſon, where a man claimed his clergy, and was found guilty by an inqueſt of office, yet the acceſſary was not arraigned, becauſe there was a poſſibility that the principal might make his purgation before the ordinary *(e)*; and ſhould the acceſſary have been found guilty and hanged, this incongruity would bring a grievous ſcandal on the juſtice of the kingdom.

If the principal was found guilty of juſtifiable homicide *ſe defendendo*, and had his charter of pardon, as there was no felony proved upon the principal, the acceſſary went quit *(f)*. Again, where the principal and acceſſary were both indicted, it was held a good plea for the acceſſary to ſay, that the principal was dead; and if the principal was hanged for any other felony, the acceſſary was to be diſcharged *(g)*. Thus, it became uſual in all caſes, not excepting homicide

(*a*) 26 Aſſ. 47. (*b*) 26 Aſſ. 52. (*c*) 27 Aſſ. 10. (*d*) 44 Ed. III. 7.
(*e*) 5 Aſſ. 5. 18 Aſſ. 13. 26 Aſſ. 27. (*f*) 15 Aſſ. 7. (*g*) 22 Aſſ. 40.

itſelf,

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itſelf, where the principal was not yet attainted, to let the acceſſary to mainpriſe *(a)*.

By the old law, judgment of felony did not uſe to be paſſed againſt an infant within age; but we find a girl of thirteen years was burnt for killing her miſtreſs: this was in the 12th of this king; but they ſeemed to think, that the propriety of executing a judgment of death on a child, was to depend on the appearance of capacity and underſtanding, which would be different in different perſons. If a child did any thing that ſhewed he was ſenſible of having acted wrong, they pronounced, that *malitia ſupplet ætatem*, and proceeded as with an adult *(b)*. Married women were in Bracton's time conſidered as *in poteſtate viri*, and ſo privileged in caſes of felony; but that was with a diſtinction which has not been obſerved ſo much as the good ſenſe of it deſerved *(c)*. A married woman, in this reign, would have confeſſed the felony, and that ſhe did it by the command of her huſband; but the judge would not take the confeſſion: however, he directed the jury to find, that ſhe did it by coercion of her huſband, and upon that ſhe went quit *(d)*. A woman might plead her pregnancy to reſpite her execution; but this would not be allowed a ſecond time.

The offence of conſpiracy, the legal conſideration of which had become a great object ſince the reign of Edward I. might be proſecuted either at the ſuit of the king or of the party; and the judgment in thoſe two caſes was different. In the latter, it was for a recovery of the damage ſuſtained by the plaintiff, and impriſonment of the defendant: in the former, he underwent a ſimilar pain with attainted jurors; namely, he was to loſe his *liberam legem*, to be no more put in juries or aſſiſes, nor to be a witneſs to ſpeak the truth; and, if he had any buſineſs in the king's court, he was always to make an attorney to ſue for him; he was not to come within twelve miles of the king's reſidence; his lands and chattels were to be ſeiſed into the king's hands, his houſes to be deſtroyed, his wife and children turned out, his trees cut down, and his body impriſoned *(e)*. How the *villainous judgment* (for ſo this was called) firſt became the puniſhment in caſes of conſpiracy, does not appear; it was not preſcribed by the ſtatutes of Edward I. which gave the writ of conſpiracy. The affinity that this offence bore to the falſe ſwearing of jurors (being often the cauſe and motive to it) might dictate a like mode of puniſhing thoſe who were guilty of it.

(*a*) 40 Aſſ. 8. (*b*) 12 Aſſ. 30. (*c*) Part I. (*d*) 27 Aſſ. 40. (*e*) 46 Aſſ. 11.

We

Appeals.

We have ſeen that the ſtatute of Glouceſter (*a*) had taken away the neceſſity of making freſh ſuit in proſecuting an appeal, provided the party commenced it within a year after the fact. The method of proſecuting an appeal in this reign was as follows: The proſecutor was to come in full county within a year and day after the fact, and find two ſufficient pledges of proſecution; the coroner was then to enter his appeal in the roll, and forthwith command the bailiff of the place to have the body of the appellee at the next county; and if the bailiff teſtified at two counties, that he was not to be found, then he was to be demanded from county to county till he was outlawed. Should the plaintiff make any default, the *exigent* was to ceaſe, as in Bracton's time, till the coming of the juſtices in eyre, and the plaintiff loſt his ſuit (*b*). It was held, very early in this reign, that appeals would lie before juſtices of gaol delivery. It was held, that an appeal would lie in the king's bench at Weſtminſter of a robbery in Yorkſhire; on the idea, that the juſtices there were the ſovereign coroners of the land; and therefore they might do ſuch acts as the ſheriffs and coroners did reſpecting appeals (*c*). Appeals, like other records, might be removed from before the coroners into the king's bench.

The ſtat. Weſtm. 2d, which gave impriſonment and damages in caſe of falſe appeals, occaſioned ſome diſcuſſion (*d*). It was held, that though the defendant was acquitted, yet there ſhould be no inquiry of the damages or abettors if an indictment had been preferred; as thereby a fair preſumption of guilt was raiſed ſufficient to take away all charge of malice in the plaintiff. But if the appeal and indictment did not agree, as where one was againſt the party as principal, the other as acceſſary, there the defendant might have his damages: the ſame if the indictment was brought after the appeal (*e*). If the jury found it homicide *ſe defendendo*, there would be no inquiry of damages and of the abettors, becauſe the jury had pronounced there was no malice (*f*).

The object in an appeal of robbery, or larceny, was the reſtitution of the thing ſtolen, which could not be obtained by conviction upon an indictment. It was therefore held, that though the defendant had his clergy, yet the plaintiff would be intitled to a reſtitution (*g*). A difficulty aroſe where a man was appealed by three different perſons, and, being convicted at the ſuit of one, was hanged: it was ſaid, the others ſhould have no reſtitution,

(*a*) Part I. 402. (*b*) 22 Aſſ. 97. (*c*) 17 Aſſ. 5. (*d*) Part I. 440. (*e*) 40 Aſſ. 18. 22 Aſſ. 39. 40 Ed. III. 42. (*f*) 22 Aſſ. 77. (*g*) 44 Ed. III. 44.

but

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but that the goods were forfeit. Yet it was directed by one of the juſtices, that an inqueſt ſhould try whether the thief was taken by them, and whether the goods were theirs; and both theſe iſſues being found in the affirmative, they had reſtitution, as being no ways in default (*a*). The ſame if the defendant ſtood mute upon an indictment, and an appeal was then depending (*b*): in like manner where the defendant, after pleading not guilty, fled to ſanctuary (*c*) and abjured.

THERE was commonly both an indictment and an appeal depending for the ſame fact; and the appeal would ſometimes, on default of the appellor, be arraigned at the ſuit of the king. A woman appealed a man, and he was acquitted; the ſame perſon and ſeveral others were afterwards indicted of the ſame fact; upon which ſhe brought a freſh appeal: but it was held, that when ſhe had brought one appeal, and the defendant was acquitted by nonſuit after appearance, or in any other way, ſhe could not have a ſecond appeal againſt any others: ſo they were arraigned at the king's ſuit (*d*). If an appeal was defective in form, or void, and ſo the plaintiff could not proſecute it, neither could it be arraigned at the ſuit of the king (*e*). An acquittal upon an indictment within a year after the fact, was thought to be no bar of an appeal (*f*); the plaintiff being intitled, it ſhould ſeem, to bring his appeal at any time within the year. The higher ſuit was the appeal, which was therefore more favoured and conſidered than the indictment. An heir brought an appeal after an indictment, and the declaration agreed neither in year, day, nor weapon, with the indictment; afterwards the parties compromiſed the matter, and the plaintiff was nonſuit after declaration: but notwithſtanding this, the defendant was arraigned upon the declaration, and not upon the indictment, and a *ceſſet proceſſus* was entered on the indictment (*g*). In an appeal by an infant, the paroll uſed to demur; and if the party was arraigned on the indictment and pleaded not guilty, he would be let to mainpriſe till the infant was of age to proſecute the appeal (*h*). The attainder of the anceſtor was held a good plea to bar the heir of an appeal, though it would not bar the widow; the former being an action which accrued by reaſon of blood; the latter not (*i*).

IT had long been agreed, that, ſhould a perſon be ſtruck in one county and die in another, an appeal might be brought in the county where he died;

(*a*) 44 Ed. III. 44. (*b*) 22 Aſſ. 16. (*c*) 26 Aſſ. 32. (*d*) 47 Ed. III. 16. (*e*) 27 Aſſ. 25. 13 Aſſ. 11. (*f*) 17. Aſſ. 1. (*g*) 4 Ed. III. 10. (*h*) 32 Aſſ. 8. (*i*) 2 Aſſ. 3.

and

and if the defendant was arraigned at the ſuit of the king, there would be a jury out of both counties (*a*). But where an appeal was brought againſt two, one for killing in one county, and the other for receiving the offender in another, it was agreed that an appeal could not be laid againſt a principal in one county, and an acceſſary in another, unleſs where it was in one vill that extended into two counties, though the former caſes were admitted to be law (*b*).

Appeals by provors were ſtill a common mode of proſecution, and many deciſions happened which ſhew the nature of this proceeding. It was agreed, that none but ſuch as were in priſon for felony could become provors (*c*). If a provor received the king's pardon after the appeal, the appellees went quit; but ſhould a provor diſavow his appeal, or die, between the joining battel or iſſue and the trial, the appellee was to be arraigned at the ſuit of the king; ſo that in this reſpect it was like a common appeal or an indictment (*d*). The following caſes may give ſome idea of the effect and conſequence of this mode of proſecution. A provor was hanged, and the appellee was not arraigned at the ſuit of the king (*e*). A provor was non-ſuited, and then attempted to plead that he was taken out of ſanctuary; but this plea was not allowed after he had confeſſed the felony by becoming a provor, and he was adjudged to be hanged (*f*). A man after pleading not guilty was not permitted to become a provor (*g*). A provor was hanged for appealing perſons out of the kingdom, who being out of the reach of the law could not be attainted (*h*): ſo ſtrictly were theſe perſons held to the performance of the terms on which they were to have their lives. A provor diſavowed his appeal, on pretence that he made it by dureſs: the coroner denied this; and the record of the coroner was judged ſufficient evidence of his being voluntary in the appeal, and he was accordingly hanged (*i*). Where a defendant in an appeal of robbery wanted to approve the appellor, and demanded a coroner for that purpoſe, it was held, that he could make no appeal of any other than the goods in queſtion (*k*). It was a good plea againſt a provor to ſay he had abjured the realm, and ſo was out of the common law; and if it was found to be ſo by the rolls of the coroners, he would be hanged, and the appellee go quit (*l*): outlawry was likewiſe a good plea againſt a provor (*m*).

(*a*) Bro. App. 149. 41 Ed. III. 6. 19. (*b*) 45. Aſſ. 9. (*c*) 21 Ed. III. 18. (*d*) 47 Ed. III. 5. (*e*) 21 Ed. III. 17. (*f*) Ibid. (*g*) 21 Ed. III. 18. (*h*) 1 Aſſ. 2. (*i*) 12 Aſſ. 29. (*k*) 40 Aſſ. 39. (*l*) 11 Aſſ. 27. (*m*) 21 Ed. III. 17.

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Indictments.

THE proceeding by preſentment and indictment became more common in caſes of felony, than it had been in any former period. As indictments were, by a ſtatute of Edward I. directed to be in writing and indented, they, after that, were framed with deliberation and in form. Wherever an indictment was preſented for a matter which by the old law might have been proſecuted by appeal, it was natural to adopt the words and phraſe of ſuch appeals; ſo that an indictment differed very little from an appeal of the ſame offence, except in the introductory part; *Juratores pro domino rege ſuper ſacramentum ſuum preſentant quòd, &c.*

THE commiſſions of *oyer & terminer*, beſides enumerating ſpecific offences, authorized the commiſſioners to hear all "damages, grievances, extortions, and deceits" done to the king and his people. Owing to this, an idea had prevailed, of the great extent of the inquiſitorial authority with which the preſentors before ſuch commiſſioners were inveſted; and many miſpriſions and irregularities were attempted to be proſecuted in this way, which were perhaps not before conſidered as criminal, but were thought to be fitter objects of a civil action.

THE following are experiments in this liberal ſort of penal juriſprudence. An indictment againſt a perſon for taking 20s. of ſuch a one when he was collector of the taxes, was held good as for extortion; but an indictment againſt a man as "a common misfeaſor" was held ill for the uncertainty: the ſame of a "common thief;" as a man ſhould be brought (it was ſaid) to anſwer not for every act of his life, but for ſome particular fact *(a)*. An indictment for concealing the cuſtom, in order thereby to get advantage of the market, and to enhance the price of merchandiſe, was held good *(b)*. But where ſome juſtices of *oyer & terminer* were indicted for changing ſome preſentments, by entering on the roll as felonies what were only treſpaſſes, they demurred to the indictment *(c)*. And an indictment, *quòd cepit et aſportavit* certain charters concerning land was held ill, as not being of a criminal nature *(d)*. An indictment for voluntarily ſuffering a felon to eſcape *(e)*, and againſt an indictor *felonicè* for diſcovering the king's counſel, were held good: the latter, which ſeems to be a ſingular caſe of felony, was ſaid by *Shard* to be treaſon *(f)*.

IN the time of Bracton the preſentment of offences was by a jury of twelve, returned for every hundred in the county *(g)*. But the courſe had now

(a) 22 Aſſ. 73. (b) 43 Aſſ. 38. (c) 27 Aſſ. 18. (d) 30 Aſſ. 37. (e) 27 Aſſ. 62. (f) 27 Aſſ. 63. (g) Part I. 323.

received

received ſome ſmall alteration; for towards the cloſe of this reign we find, at a commiſſion of oyer and terminer, that beſides the return of an inqueſt for every hundred by the bailiff, the ſheriff likewiſe returned a pannel of knights, which, ſays the book, were *le graunde inqueſt*. The inqueſts for the hundreds ſtill made their preſentments, as in Bracton's time (*a*); and if they preſented, they likewiſe, no doubt, found indictments; but theſe were confined to their different hundreds. The grand inqueſt probably was to inquire at large for every hundred in the county; and they all equally became jurors in inqueſts *de bono et malo*, or *ex officio*, when called upon; and if a commiſſion of aſſiſe and *niſi prius* were ſitting, they filled the place of jurors occaſionally in aſſiſes and juries, in cauſes. When the practice began of returning a grand inqueſt to inquire for the whole body of the county, the buſineſs of the hundred-inqueſt muſt naturally decline, till at length the whole burthen of preſenting and finding indictments devolved upon it, and the hundredors continued to be ſummoned merely for trying iſſues.

Of penance.

If there remains any doubt, whether priſoners were ſubjected to a ſort of penance before the ſtat. Weſtm. 1ſt. it ſeems to be wholly removed by ſome caſes reported in this reign; where this penance was inflicted without the leaſt authority from that ſtatute (*b*). In the 21ſt year, a man was appealed of robbery, and was taken at the plaintiff's ſuit, with the manor: he then ſtood mute, and an inqueſt *ex officio*, as was uſual, being impannelled to try whether he could ſpeak, and they finding that he was mute of malice, it was adjudged that he ſhould be hanged; and it was at the ſame time ſaid, that had it been at the ſuit of the king, he would have been put to his *penance*, there being this difference between an appeal and an indictment (*c*). But this diſtinction did not hold univerſally, at leaſt as to the appeal; for in the 43d year, when a woman appealed a man of the death of her huſband, and he ſtood mute, and it was found by an inqueſt *ex officio*, that he had ſpoken that ſame day, he was ordered to the *penance* (*d*). It is probable that the latter was the moſt uſual courſe, and that the robber in the former caſe was hanged, merely becauſe he was found with the manor. Conformably with this idea, we find that, in the 26th year, a man was arraigned after he had abjured the realm, and ſtanding mute, was put to his penance; but it was ſaid, that a provor ſtanding mute ſhould be hanged (*e*). The

(*a*) 42 Aſſ. 5. (*b*) Part I. 390. (*c*) 21 Ed. III. 18. (*d*) 43 Aſſ. 30. (*e*) 26 Aſſ. 19.

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confeſſion of the provor, and the being taken with the manor, were conſidered as convictions in themſelves, upon which it might be ſafe to execute an obſtinate offender; though it would be rigorous indeed to preſume guilt in every one who ſtood maliciouſly mute.

Trial by battel and jury.

It was endeavoured by all means to avoid the trial by *battel*, and to encourage that by *jury*. Thus, in an appeal for breaking the king's priſon, the battel was not allowed. If the defendant was taken at the ſuit of the appellor, and had eſcaped, he was ouſted of his battel, that being a ſort of priſon-breaking *(a)*: the ſame where the defendant was taken with the manor *(b)*. The trial by jury, or *per pais*, in civil cauſes, and the manner in which it was now ordered, has been already mentioned: this trial, in criminal caſes, preſerved an analogy with it, being diſtinguiſhed by very few peculiarities. It was no longer the cuſtom, as in Bracton's time, for the defendant to put himſelf upon a particular *pais* or hundred, or for the judge to direct the fact to be tried by one *pais* in preference to another. The priſoner put himſelf *upon* the country generally, which implied a jury of the county where the fact aroſe; but ſo much of the old practice continued, that the *pais* were to conſiſt of ſome hundredors belonging to the hundred where the vill was in which the fact was ſaid to be done. Thus, though the idea of the jury coming from the vicinage, and therefore acquainted with the fact they were to teſtify, was, in ſome meaſure, given up, this privity was, in conſtruction of law, rather enlarged than deſtroyed; for though the people of one hundred could not try a fact committed in another, the people of one county were not ſuppoſed to know, nor were permitted to try, a fact ariſing in another. Therefore, where a man was taken in the county of *S.* with goods that he had ſtolen in the county of *N.* it was ſaid, that the juſtices in the county of *S.* might put him to anſwer; and if he pleaded not guilty, they might ſend for a *pais* in the county of *N.* no jurors in the county of *S.* being competent to the trial of a foreign fact *(c)*.

We have ſeen a ſtatute made in this reign, ordaining, that no indictor ſhould be put on the deliverance of the priſoner whom he had joined in indicting *(d)*; ſuch therefore was a good challenge to a juror. In order to enable the defendant to make ſuch challenge, it was uſual to put the indictors' names to the indictment; and it was a good exception to an indictment, if it was

(*a*) 1 Aſſ. 3. 6. (*b*) 4 Aſſ. 1. (*c*) 26 Aſſ. 32. (*d*) Vid. ant. 116.

without

without them *(a)*. A doubt might be raiſed who were meant by the indictors; and it ſeems, that it ſignified not only the jurors who preſented, but thoſe alſo who were ſworn to inform them, or who, in the modern language of the law, preferred the indictment; and in that ſenſe was the word *indictor* taken at this time *(b)*. If ſo, the practice now was to challenge *them*, as well as the preſentors; and it was probably their names, as well as thoſe of the preſentors, that were required to be on the bill of indictment. This practice has continued to this day; though that of annexing the preſentors' names is out of uſe, and the point of law which made either of them neceſſary has been long obſolete. The courts carried the conſtruction of the above ſtatute further than the bare letter of it warranted; for where one of the indictors in treſpaſs got himſelf to be made foreman of the jury to try the iſſue in an action brought for the ſame treſpaſs, he was committed to the Marſhalſea, and paid a heavy fine; for (they ſaid) he ought to have challenged himſelf *(c)*. What other cauſes of challenge were allowed by the court, has been ſhewn before, in ſpeaking of juries in civil actions; but to prevent defendants in criminal caſes creating delay, and avoiding a trial by repeated challenges, it was laid down as a rule, that where a defendant challenged generally three inqueſts without cauſe, he was to be conſidered as refuſing the law; but if he ſhewed ſufficient cauſe of his challenge, he might challenge even more *(d)*. If a defendant did not appear to take his trial, proceſs of *capias* iſſued againſt him; and nothing elſe could be done, for it was a rule, that an inqueſt ſhould never be taken by default in criminal caſes.

Sanctuary and clergy.

SANCTUARY, abjuration, and clergy, had undergone very little alteration. If a perſon had been drawn violently from the place where he had taken ſanctuary, he might plead this to an appeal or indictment. Where a provor was nonſuit in his appeal, and then pleaded that he was forcibly taken from ſuch a church, where he had fled for ſanctuary, and prayed to be reſtored; it was adjudged, that, as he had omitted to plead that at firſt, he ſhould be hanged upon the nonſuit *(e)*. A perſon delivered to the ſheriff to be executed, if he eſcaped to a church, was not allowed the privilege of ſanctuary *(f)*. Of all theſe places of ſanctuary (and they were very numerous), the principal was that at Weſtminſter, which belonged to the abbot of that religious houſe. This was enjoyed under a grant from one of our kings. It was endeavoured

(*a*) 44 Ed. III. 43. (*b*) 27 Aſſ. 12. (*c*) 40 Aſſ. 10. (*d*) 17 Aſſ. 6.
(*e*) 21 Ed. III. 17. (*f*) 27 Aſſ. 54.

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deavoured in this reign to extend the privilege of this place to debtors, accomptants, and other caſes, beſides felony; but upon exhibiting the charter granting the privilege of ſanctuary to the abbots, they appeared to claim under the following words: *Quòd quiſquis fugitivus de quolibet loco pro quâcunq; cauſâ cujuſcunq; conditionis fuerit, ſi ipſe* SANCTUM LOCUM *Weſtmonaſterii fugiens intravit, membrorum et vitæ impunitatem conſequatur*; and it was decided by all the juſtices, notwithſtanding the ſeemingly general exemption given by ſome of thoſe words, that the ſanctuary was confined to felons *(a)*. The reſort of felons to this place, being in the metropolis of the kingdom, muſt have been very great, and productive of great diſorders. The abbot of Weſtminſter was, beſides, the ordinary of the king's bench, and had a priſon (which in later times was the Gate-houſe) where he kept thoſe clerks that were delivered to him from the Marſhalſea *(b)*.

THE manner of delivering clerks to the ordinary, if clergy was claimed upon the arraignment, was the ſame as in Britton's time *(c)*; only inſtead of the *preſentors*, as was ſuppoſed, trying him, there was a jury impannelled *ex officio* (ſo every jury was called, which was not impannelled on the prayer of the party); and this was the practice in the laſt reign. Clergy was allowed to a defendant in appeal as well as on an indictment, and a provor might have his clergy *(d)*. It ſeems, that a clerk had not his privilege if he was not demanded, or was diſowned, by the ordinary. A clerk was found guilty of felony, and ſhewed his clerkſhip by reading, but nobody challenged him; however, he was not hanged, but ſent to priſon: and this was the uſual courſe, as it ſhould ſeem, where the party was found guilty by the inqueſt *ex officio* only. For where the ſame clerk, chuſing to riſk a trial rather than ſuffer indefinite impriſonment, renounced his clergy, pleaded to the country *de bono et malo*, and was found guilty; but again claimed his clergy, and no ordinary appeared to challenge him, he was hanged *(e)*. Again, where a man was found guilty, and, upon claiming his clergy, was refuſed by the ordinary becauſe he had broke the archbiſhop's priſon, he was hanged, by the advice of all the juſtices *(f)*. A clerk was attainted of breaking the biſhop's priſon, and claimed his clergy; but it was anſwered by the judge, *fruſtra legis auxilium invocat, qui in legem committit*. He ſaid, if the biſhop would claim him, he might have his privilege; but the ordinary diſclaimed him, and he was hanged *(g)*. As there was this diſtinction between a con-

(*a*) 29 Aſſ. 34. (*b*) 21 Aſſ. 12. (*c*) Part I. 483. (*d*) 43 Ed. III. 42. Bro. Clerg. 28. (*e*) 12 Aſſ. 15. (*f*) 12 Aſſ. 39. (*g*) 27 Aſſ. 42.

viction

viction by the jury *ex officio*, and that *de bono et malo*, it was adviſeable for a clerk to claim his clergy on the arraignment, leſt he ſhould not be demanded by the ordinary after conviction (*a*).

When the privilege of clergy thus depended upon the will and pleaſure of the ordinary, it was reaſonable enough to allow it in the offence of ſacrilege, the church being at liberty to pardon offences againſt itſelf. It was therefore held, that ſtealing a chalice did not preclude a man from his clergy, if he was claimed by the ordinary (*b*). If a clerk had denied that he was a clerk, yet he would afterwards be permitted to read, and ſhew that he was one. Reading ſeems to have been the grand evidence of clergy: however, we find *Shard* adopting the ſaying, *quòd literatura non facit clericum niſi habet ſacram tonſuram*; and that an ordinary challenging one who was not a clerk ſhould loſe his temporalities (*c*). A prieſt who had abjured, returned without the king's licence; and being arraigned for this offence, and pleading his clergy, he was ſent to priſon, and it was ſaid he would have been hanged had he been a layman (*d*).

Another plea which prevented the going on to trial, was that of *autre foit acquit* of the ſame felony; upon which the defendant was expected to produce the record of acquittal (*e*). It ſeems not to have been ſettled whether *autre foit convict*, or *attaint* (for no diſtinction was yet made between them), ſhould be a plea to avoid a ſecond trial. Where a man was appealed by three appeals of robbery, and was convicted on one, the juſtices had great doubt whether he ſhould be put to anſwer to the reſt, or hanged upon that conviction. This doubt was entertained through tenderneſs to the other appellors, who could not have reſtitution without a conviction; but upon conſideration, the man was hanged without being arraigned upon the other appeals, and the parties had reſtitution of their goods without a conviction (*f*). When this mode was ſtruck out, it probably ſoon became ſettled, that *autre foit attaint* ſhould be a good plea in an indictment or appeal.

Of forfeiture.

The law of forfeiture was ſtrictly enforced in theſe times, and the occaſions of exerting it ſeem to have been as eagerly caught at. It was held, that where a defendant claimed his clergy after verdict of conviction, the

(*a*) *Brooke*, not obſerving the difference between a conviction by theſe two juries, concludes, that, as ſome ſuch diſclaimed clerks were hanged, and ſome not, it reſted wholly on the diſcretion of the juſtices. Bro. Clerg. 9. (*b*) 26 Aſſ. 27. (*c*) 26 Aſſ. 19. (*d*) 1 Aſſ. 4. (*e*) 26 Aſſ. 15. (*f*) 44 Ed. III. 44. b.

judgment

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judgment was *ſuſpendatur per collum*, and by virtue of this he forfeited his goods. This was another reaſon for praying clergy before verdict; for then, there being no pretence for ſuch a judgment, there was not properly a forfeiture *(a)*; though there are not wanting inſtances where the forfeiture was enforced even in ſuch caſes *(b)*. It ſhould ſeem that no interval was left between the verdict and judgment, but that it was uſual to enter it immediately; and therefore, in all the old books, the *conviction* and *attainder* are ſpoken of without any diſtinction, as if they were the ſame thing. The forfeiture in the time of Bracton ſeems to have been more general than it was now held to be; they then forfeited *all* rights of action *(c)*. The law now was, that though debts by obligation were forfeit, yet ſimple contract debts were not; the reaſon for which was, as has been before obſerved, that the defendant, who might wage his law in ſuch caſe, would be deprived of that privilege when ſued by the king *(d)*. The goods were forfeited by the iſſue of the *exigent*, though the party might be afterwards acquitted of the felony *(e)*. One who fled to a church for felony forfeited his goods, as in other caſes of flight, with the profits of his lands; and if he abjured, he forfeited his lands alſo *(f)*. It was ſaid, that land purchaſed after a felony committed, was forfeited equally with that enjoyed before *(g)*. In caſe of a feoffment to baron and feme in fee, if the baron committed felony, the land was not forfeited, but ſurvived intirely to the feme, on the idea that the feme could take no moiety with her huſband *(h)*. Where a perſon, being iſſue in tail, was outlawed for felony during the life of the tenant, and had his pardon, he might enter, after his anceſtor's death, as heir in tail, though it would be otherwiſe with the heir in fee-ſimple; but it was thought, that ſhould the anceſtor die before the pardon, the heir in tail could not enter, becauſe the king would be intitled to the profits during the life of the outlaw *(i)*. The ſtriking of a juror for giving a verdict againſt a man in the hall at Weſtminſter, was an offence that was puniſhed with loſs of lands and goods, beſides amputation of the right-hand *(k)*. Not to bring this calamity of forfeiture on a man before he was proved guilty, the law ſtill preſerved the humanity it profeſſed in Bracton's time *(l)*. The ſheriff was not to ſeize and carry away the goods of a felon immediately upon his being indicted, but to take ſurety of the party that they

(*a*) 40 Ed. III. 42. (*b*) Fitz. Aſſ. 116. (*c*) Part I. 316. (*d*) 50 Aſſ. 1.
(*e*) 22 Aſſ. 21. & paſſim. (*f*) Bro. Forf. 121. (*g*) 48 Ed. III. 2. (*h*) 4 Aſſ. 4.
(*i*) 29 Aſſ. 61. (*k*) 41 Aſſ. 25. (*l*) Part I. 318.

ſhould

ſhould not be withdrawn; and if he would not give ſurety, they were to be put into the hands of the neighbours to be kept till the event of the proſecution was known (*a*).

The king and government.

The dominion of laws and of a ſettled government ſeem fully to have eſtabliſhed themſelves under the great power and popularity of this prince. The law was a protection for the properties and lives of the people; and there generally appeared in the reigning power an anxiety to preſerve it unviolated. However, it cannot be denied that this king, as well as his predeceſſors, diſcovered a ſtrong attachment to his old prerogatives; and there are not wanting inſtances wherein he acted illegally, and infringed the undoubted rights of the people.

The many confirmations of Magna Charta, and the ſtatutes made to prohibit protections, are ſtrong proofs of the practices which called for ſuch parliamentary interpoſition. All the antient prerogatives of the crown were, at one time or other, exerciſed by this king. The levying of money without aſſent of parliament; the diſpenſing power; an oblique confirmation of that power by ſtatute 1 Ed. III. c. ; monopolies, loans, impriſoning members for freedom of ſpeech, extenſions of the foreſts, renewal of the commiſſion of trailbaſton (*b*), preſſing men and ſhips, levying arbitrary fines, the council obliging people to find recruits (*c*); all theſe extraordinary exertions of power were kept on foot by Edward the Third.

The regard paid by this prince to the ſanction of the legiſlature is ſhewn in one ſtrong inſtance: Having found it neceſſary to conſent to an act of parliament, by which the controul over his great officers had been taken from him, and conferred on the parliament; he iſſued an edict, in which he affirms, that he *only diſſembled* when he ſeemed to ratify that act, but that he had never in his own breaſt given his aſſent to it. To prevent, therefore, the inconveniencies which he thought he foreſaw would follow from that law, he, with the advice of his council, and *ſome* earls and barons, *thereby abrogated* and annulled it. The next parliament, ſo far from taking any notice of this extraordinary proclamation, conſented to a legal repeal of the ſtatute (*d*).

Trials.

When the parliament was thus contemned in its legiſlative capacity, the king could have no trouble in managing their judicial deciſions according to the exigency of his own occaſions.

(*a*) 43 Ed. III. 24. (*b*) 2 Ed. III. 41. (*c*) 2 Hum. 490. (*d*) 2 Hum. 414. Parl. Hiſt. 264.

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THE earl of Kent was attainted by parliament, without any formality of enquiry. Roger Mortimer, who had procured that attainder, was himſelf accuſed before parliament, and condemned by the lords upon the mere exhibition of the articles, "without any further enquiry, becauſe every thing therein contained was notorious, and known to themſelves (*a*)." About twenty years afterwards this attainder was reverſed in favour of his ſon; and the reaſon there given, was the illegality of the proceedings. It is obſerved, that the principles of law and juſtice were eſtabliſhed not in ſuch a degree as to prevent an iniquitous ſentence againſt a devoted perſon, but ſufficient to ſerve as a reaſon for its reverſal on a change of things in favour of himſelf or his party (*b*).

THE next objects of enquiry are thoſe monuments of legal antiquity which contribute to furniſh information through the reign of this king. Theſe are the Statutes, Parliament-rolls, Year-books, and ſome ſmall law tracts.

The Nova Statuta.

THE ſtatutes from the beginning of this reign are called *Nova Statuta*, as contra-diſtinguiſhed from thoſe which preceded. It ſeems that the commons began now to take ſome partial ſhare in the legiſlature, for moſt of the principal acts made in this reign were made upon petitions of the commons. However, even in theſe inſtances, where the motion for a law originated with the commons, and after the anſwer of the king was favourable, it ſtill remained with the king and his council to digeſt the whole into the form of a ſtatute, as in former times: the anſwer to the commons very often intimated, that the king would conſult with others before he granted the petition; and this was never thought derogatory to their rights.

THAT this was ſo, will appear plainly from ſeveral petitions and anſwers on the parliament-rolls. In the 21ſt year of the king, to a petition requeſting the king to increaſe the fees of the judges, he anſwered, that he would call to him the great perſons, and mention the matter to them, and upon their advice would ordain ſuch remedy as ſhould be proper (*c*). Again, upon another petition in the ſame parliament, he anſwered, he would adviſe with his council. When petitions were delivered in, they were ſometimes not attended to with ſo much diſpatch as the commons expected. In the 22d year the commons prayed they might be anſwered preſently; to which it was anſwered, that they ſhould be anſwered after Eaſter (*d*). Notwith-

(*a*) Parl. Hiſt. 223. (*b*) 2 Hum. 379. (*c*) Cott. Abri. 21 Ed. III. 6. (*d*) Cott. Abri. 22 Ed. III. 7.

ſtanding

ſtanding theſe remonſtrances, it continually happened that the making of laws was delayed; for though the petition might be anſwered at the ſeſſion, when it was preſented (which, however, was not always the caſe), yet ſometimes ſeveral years elapſed before it was framed into a law. Moſt of the acts which in the ſtatute-book appear in the 25th year of the king, were anſwered in the 21ſt year; ſome were delayed longer. The petition about error in the court of exchequer was preſented firſt in the 21ſt year, and anſwered; but the petition and anſwer were both forgotten, and the commons petitioned again the next year, when the former anſwer was referred to by the king (*a*); and after all, it was not put into a ſtatute till the 31ſt year (*b*). Many inſtances are to be found of the like delay.

When ſtatutes were framed ſo long after the petition and anſwer, it is not to be wondered that they did not always correſpond with the wiſhes of the petitioners, but were modified according to ſome after-thought of the king's officers who had the care of penning ſtatutes. The commons often complained of this. In the 22d year they prayed, that the petitions anſwered in the laſt parliament might not, under pretence of any freſh bill or petition, be altered or changed. But notwithſtanding this remonſtrance, the petition and anſwer were not always adhered to, as the exact model for the ſtatute. In the 25th year, a petition was exhibited againſt ſuing before the council, when part of it was granted; and as to the reſt, the king ſaid he would be adviſed (*c*); and yet ſtat. 25 Ed. III. ſtat. 5. c. 4. enacts the whole. Again, in the famous ſtat. 36 Ed. III. ſtat. 1. c. 15. after the words of the petition are added, "*and that they be entered and enrolled in Latin*;" of which there is not a ſyllable in the petition (*d*).

The variations above mentioned do not appear to be very material; they did no more than explain in a fuller manner what perhaps was the ſenſe and aim of the petition. It was more important when a petition was granted, and afterwards never heard of; an inſtance of which is to be found in 21ſt year, when a petition, praying that writs of error might be allowed in actions *qui tam*, was granted by the king; though there appears no ſubſequent ſtatute for that purpoſe (*e*). There are many intimations in the parliament-rolls, of acts being to be made, of which, however, we find no other trace whatever (*f*).

(*a*) Cott. Abri. 21 Ed. III. 26. & 22 Ed. III. 25. (*b*) Stat. 31 Ed. III. ſt. 1. c. 12.
(*c*) Ibid. 25 Ed. III. 16. (*d*) Cott. Abri. 36 Ed. III. 39. (*e*) Ibid. 21 Ed. III. 24.
(*f*) Among others, Cott. Abr. 8 Ed. III. 20, 21, 22. and *paſſim* thro' that Abridgement.

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IT is not probable that theſe petitions and anſwers were wholly diſappointed of their effect, though they were not thrown into the form of a ſtatute. It ſeems the parliament, upon the petitions of the commons, exerciſed two branches of its authority; by one of which it legiſlated, or made new laws; by the other, it interpreted the then exiſting law. When, therefore, a declaration of ſome point was prayed by petition, it was the buſineſs of the receivors and tryers of petitions to conſider whether the matter prayed could be complied with, conformably with the then exiſting law; or whether it would be new, and inconſiſtent with it: for in the former caſe, an anſwer, accompanied with ſome inſtrument to teſtify it, would of itſelf be ſufficient to warrant it; in the latter, there muſt be an expreſs ſtatute. It is in this way that the following words of ſtat. 15 Ed. III. c. 7. are to be underſtood: "That the petitions ſhewed by the great men and the commons "be *affirmed* according as they were granted by the king; that is to ſay, "ſome by *ſtatute*, and the other by *charter* or *patent*, and delivered to the "knights of the ſhire, without paying any thing."

MANY examples of a like diſtinction may be produced out of the parliament-rolls. In the 21ſt year of the king, it was prayed by the commons, that a plaintiff in debt or treſpaſs might have execution of the land, which the defendant had the day of the writ purchaſed. To this it was anſwered, that it could not be done *without a ſtatute*; upon which the king would adviſe with his council (*a*). Again, where the king granted lands forfeited by treaſon, the commons prayed it might be *declared*, whether in ſuch caſe the donees held of the king, or of the lord of whom the traitor held. To this it was anſwered, that, for the preſent, it ſhould remain as it had formerly been; but, if *declaration* thereof was to be made, it ſhould be by good advice, among other articles whereof *new law* was required (*b*); which ſame anſwer was given to ſeveral other petitions in that parliament (*c*).

THESE paſſages very clearly intimate, that there was another parliamentary way of ſettling the law than by *ſtatutes*; and that way muſt have been the *charters* and *patents* mentioned in the above act. Laws of this ſort had no other ſanction than the parliament-roll, where the anſwer was written; and theſe were probably what were called *ordinances*, being of equal force and validity with *ſtatutes*, but leſs ſolemn and public, becauſe they were only a declaration, and not an alteration, of the law. A ſtatute was drawn up with

(*a*) Cott. Abri. 21 Ed. III. 13. (*b*) Ibid. 43. (*c*) Ibid. 46, 47. 52.

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the advice and deliberation of the judges and other learned men, and was entered on a roll, called the *ſtatute-roll*; afterwards the tenor of it was annexed to a proclamation writ, directed to ſeveral ſheriffs to proclaim it in their county. Ordinances were never proclaimed by the ſheriff; but it was ſometimes recommended by the king to the commons (probably by a *charter* or *patent*) to publiſh them in their county.

THO' theſe were the peculiar and diſtinct offices of ſtatutes and ordinances, it is ſtill clear, that many things which were mere *declarations* of the old law, were done by ſtatute, as appears by the formal words, and by the contents of ſeveral: and as every thing might be done by ſtatute that could by ordinance, it depended perhaps on the nature of the ſubject, and the wiſh of the managers of it, whether the old law ſhould be declared by one or the other. A ſtatute was an ordinance, and ſomething more; and therefore, tho' ſtatutes may ſometimes be called ordinances, yet no inattention to language would excuſe the converſe of the propoſition. Tho' an ordinance could be altered by a ſtatute, yet a ſtatute could not be altered by an ordinance. After all, the principal mark of a ſtatute was, its being entered on the ſtatute-roll.

Reports.

THE reports of this reign fill four volumes. Three of theſe are diſtinguiſhed as *Year-books*, and are called the *firſt*, *ſecond*, and *third parts* of Edward III. The other volume is called *Liber Aſſiſarum*; being a collection of caſes that aroſe on aſſiſes, and other trials in the country. The firſt part contains the firſt *ten* years of this king, very completely reported: the ſecond part is incomplete, containing the 17th, 18th, 21ſt, 22d, one term of the 23d, the 24th, and to the 30th inclusive; then there is a chaſm till the 38th and 39th, which cloſe the book. The third part begins with the 40th year (and thence it is commonly called the *Quadrageſms*) and goes on regularly to the end of the reign. The *Liber Aſſiſarum* contains every year regularly all thro' the reign.

THESE books of reports have not maintained an equal reputation with poſterity; the books of aſſiſes, and particularly the *Quadrageſms*, having been generally preferred to the reſt. But this comparative value is owing, perhaps, more to the accidents of time and circumſtances, than to any intrinſic merit of their own. It happened, that many points of learning diſcuſſed in the firſt and ſecond parts became more obſcure, and leſs known, than thoſe in the third part; in conſequence of which, very few caſes are abſtracted from the ſecond part by Fitzherbert and Brooke, and hardly any from the firſt; and

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and as theſe two abridgements became in after-times the principal clue to the Year-books, not to ſay the ſubſtitutes for them, the firſt part of theſe reports ſunk into oblivion, and the ſecond was little regarded; while the *Quadrageſms* and the *Liber Aſſiſarum* were alone conſulted as depoſitaries of the law in this reign. It ſhould ſeem, this neglect of the oldeſt Year-books had, unhappily, an effect upon the ſtill older writings of Fleta and Bracton. A ſort of chaſm was made between thoſe authors and the latter end of this reign; and as the chain of legal hiſtory was broken, by which their fidelity as lawyers would be beſt demonſtrated, their credit and authority were conſiderably diminiſhed.

VIEWING theſe volumes with the judgement and prepoſſeſſion of a modern lawyer, one muſt certainly concur with the opinion long entertained in favour of the *Quadrageſms* and book of aſſiſes; they contain more of thoſe points of law that have ſurvived to the preſent times, and matters are there diſcuſſed with more preciſion and clearneſs. In regard to preciſion and clearneſs, all the reports of this reign excel thoſe of the preceding; but the merit of theſe volumes is of a peculiar kind, and has a very different appearance from what has in later times been conſidered as excellent in this way. We find here no learned argument, no quotation of caſes, compared, diſtinguiſhed, and applied to the point in queſtion. The bench rarely deliver a ſolemn judgment, ſetting forth the principles and grounds upon which they proceeded, or alledging any former determination by which they were ſwayed: a report is little more than a ſtate of the facts, with *dictums* of law on both ſides, unſupported by any authority. That the allegations and arguments of counſel ſhould be unſupported by adduced authorities, is not at all remarkable, at a time when there was ſuch a ſcarcity of publiſhed reports. This want of written memorials of the law was repeatedly lamented in the reign of Edward the Firſt; and it was one of the wiſeſt means uſed by that king towards improving the law, when he ordered law-books to be written; but the effect of ſuch an undertaking muſt be ſlow. We find, in the reign of Edward the Second, the author of *The Mirror* complains that the law in his time was not ſufficiently reduced into writing. During ſuch a ſtate of things, the knowledge of the law muſt be confined to the practicers, and ſubſiſt rather in the experience of old profeſſors, than in volumes of reports; of which there muſt, in the nature of things, be few in this reign, and thoſe kept, no doubt, with ſufficient jealouſy, for the uſe of their owners; the conſequence of which would naturally be, that, with the uſe, the authority of them in a great degree

gree would be confined to their poſſeſſors. There were certainly no reports of eſtabliſhed and general credit; otherwiſe it is not eaſy to imagine, why no adjudications are vouched for what is laid down as law. According to the form of theſe reports, every thing is to be taken on the bare authority of the perſon pronouncing it.

However unſupported they may ſeem, the reports of this reign have always had great weight with poſterity, tho' revived upon their own authority alone: nor is this without great ſhew of reaſon. Theſe volumes ſeemed to claim a higher regard than any which had been produced in the preceding reigns. The law here ſpoke out in its own written annals, and was delivered by the oracles of it, the judges ſitting on the ſeats of juſtice. The whole method of legal proceeding was exhibited to the reader. This was a lively way of tranſmitting the knowledge of our laws; it commanded a more ſerious regard, and ſeemed to carry in itſelf an incontrovertible authority; unlike the treatiſes written by private men, who, however learned or experienced, could not aim at an equal degree of authenticity. This conſideration placed reports in the higheſt rank of law-books, and made them a ſort of authorities in themſelves; while the treatiſes of Bracton and Fleta grew to be leſs conſidered, and at length became obſolete.

The reports of this reign engage the attention of a modern lawyer more readily than thoſe of the former, and have always been held in great eſteem. The learning, however, of theſe volumes is of a peculiar kind. Thro' all the reports of this reign there is perpetual debate on matters of form; which were ſo repeatedly diſcuſſed, and ſo fully examined, that numberleſs points of the utmoſt importance in the practice of thoſe times were ſettled. The greater part of the reports of this reign ſeem to be on this ſubject. To ſay nothing of the firſt forty years of this king, upon turning over the celebrated *Quadrageſms* it will appear, that nine parts in ten relate to the forms of writs, of pleadings, and of practice; and of theſe nine, ſix parts concern real actions.

While the ſame ſtate of things remained, and the ſame learning was in vogue, the reports of this reign muſt have had great weight, and deſerved every encomium which the grateful ſtudent could beſtow on them; and in ſuch eſtimation were they held, during moſt of the ſucceeding reigns, till the time of Henry VII. and Henry VIII. But when another order of things took place; when real actions went out of uſe, and the learning concerning them

was

was forgotten; the legal annals of this reign muſt be viewed with a very different eye. Amid heaps of endleſs curioſity about proceedings in real actions, we find a very ſmall ſpace occupied by deciſions on great and leading principles of law. This anxious minuteneſs in forms and circumſtances of actions had ſo loaded and entangled the practice of the courts, that it was found neceſſary, in after-times, to get rid of them altogether by a revolution in the courſe of legal remedies. The law-learning of Edward the Third's reign, and the ſcholaſtic learning of thoſe times, exhibit alike an unhappy miſapplication of ſagacity and diligence; and it is only by a partial redemption, that the volumes which contain the one, eſcape that oblivion which has long overwhelmed the other.

THE reign of this king has furniſhed three ſmall tracts on law ſubjects: the *Old Tenures*, *Old Natura Brevium*, and *Novæ Narrationes*.

Old Tenures.

THE *Old Tenures* (ſo called to diſtinguiſh it from Littleton's book on the ſame ſubject) gives an account of the various tenures by which land was holden, the nature of eſtates, and ſome other incidents to landed property. It is a very ſcanty tract, but has the merit of having led the way to Littleton's famous work.

Natura Brevium.

The *Natura Brevium* contains thoſe writs which were then moſt in uſe, annexing to each a ſhort comment concerning their nature, and the application of them, with their various properties, conſequences, and effects. This work became a model to Fitzherbert's valuable tract on the ſame ſubject.

Novæ Narrationes.

The collection called *Novæ Narrationes* contains pleadings in the actions then in practice. It conſiſts principally of declarations, as the title imports; but there are ſometimes pleas, and the ſubſequent pleadings. The *Articuli ad Novas Narrationes* is uſually ſubjoined to this little book, and is a ſmall treatiſe on the method of pleading. It firſt treats of actions and courts; then goes thro' each particular writ, and the declaration upon it, accompanied with directions, and exemplified by precedents. The book on *The Diverſity Courts* is ſaid (*a*) to have been written in this reign.

Miſcellaneous facts.

IT is beyond diſpute, that the Temple was inhabited by a law ſociety in the reign of Edward the Third. Upon the diſſolution of the order of Knights Templars in the laſt reign, their poſſeſſions came to the crown. The *New Temple*, as it was then called, to which they had removed from their houſe in

(*a*) 2 Inſt. 552.

Holborn,

Holborn, about the beginning of Edward the Second's reign, was granted by the late king ſucceſſively to the earl of Lancaſter, the earl of Pembroke, and Hugh Deſpencer the ſon, upon the ſeveral attainders of which perſons it again devolved to the crown. In purſuance of a decree made by the great council at Vienna, 1324, reſpecting the poſſeſſions of the Templars, king Edward the Third granted this building to the Knights Hoſpitallers of St. John of Jeruſalem; and they ſoon afterwards, as the tradition is, demiſed it at the rent of 10l. per ann. to divers profeſſors of the law, who came from *Thavies Inn*, in Holborn (*a*). At the general diſſolution of religious houſes, when the inheritance of this houſe again fell to the crown, King Henry VIII. granted them a leaſe, and they continued tenants to the crown till the 6th year of King James I. when that king granted *hoſpitia et capitalia meſſuagia cognita per nomen de le* INNER *et le* MIDDLE TEMPLE, *ſive Novi Templi*, to Sir Julius Cæſar and others, to them and their heirs, for the uſe and reception of the profeſſors and ſtudents of the law (*b*).

IT is ſaid, that ſome profeſſors of the law reſided in Gray's Inn during this reign, under a leaſe from lord Gray of Wilton, who was ſeiſed of the inheritance, and had a manſion there. The inheritance was, in 20 Ed. IV. purchaſed by the prior and monks of the monaſtery of Sheene in Surry, to whom the ſtudents continued tenants, at the rent of 6l. 13s. 4d. per ann. At the diſſolution of religious houſes, Henry VIII. granted the inheritance to the ſociety at the above rent, in fee-farm (*c*).

THE moſt authentic memorial of any ſettling of the law ſocieties in this reign, is a demiſe in 18th of Ed. III. from lady Clifford, of that houſe near Fleet-ſtreet, called Clifford's Inn, *apprenticiis de banco* (*d*).

THE chancellor, as well as the king's bench, followed the court, and was intitled to part of the purveyance made for the king, till the 4th of Edward III. when he fixed at Weſtminſter. The place where the chancellor held his court, was at the upper end of Weſtminſter-hall, at a great marble table (which is ſaid to be covered by the courts ſince erected there), to which there was an aſcent by five or ſix ſteps (*e*).

THE ſalaries of the judges, tho' they had continued the ſame from the time of Edward I. to the 25th of this reign, were again become very uncertain. In 28th Edward III. it appears, that one of the juſtices of the king's

(*a*) Dugd. Or. Jur. 145. (*b*) Ibid. (*c*) Ibid. 272. (*d*) Ibid. 141. (*e*) Ibid. 37.

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bench had 80 marks per ann. In 39 Ed. III. the judges had in that court 40l. The chief and other barons in 36 Ed. III. had 40l. In 39 Ed. III. the juſtices of the bench had 40l. and the chief of the king's bench 100 marks (*a*).

A HOUSE had been founded by Henry III. for the reception of convert Jews. The preſidency of this houſe had been uſually granted to ſome of the clerks in chancery, namely, thoſe *de primâ formâ*, who were always eccleſiaſtics, and lived as a part of the chancery in the king's palace till the 4th Ed. III. In the 15th Ed. III. the headſhip of this houſe was annexed by charter to the keeperſhip of the rolls, which was confirmed by act of parliament 51ſt of this king. This rendered the keeperſhip of the rolls more conſiderable; and being endowed with this houſe of the gift and patronage of the king, the nomination of clerks of the rolls was by degrees aſſumed by the crown, in excluſion of the chancellor. This officer of keeper of the rolls was antiently called *Gardein de Rolls*; *Clericus et Cuſtos Rotulorum*; then *Clericus Parvæ Bagæ, et Cuſtos Rotulorum et Domûs Converſorum*. In no ſtatute is he called *Maſter*, till the 11th of Henry VII. c. 18; and again, in 25th chap. of that ſame ſtatute, he is called *Clerk*. This office was conſidered as an eccleſiaſtical preferment (*b*).

(*a*) Dugd. Or. Jur. 105. (*b*) Hiſt. Chanc. 21.

CHAP.

CHAP. XII.

RICHARD II. HENRY IV. and HENRY V.

Statutes of Richard II.—Copyholds—Statutes of Liveries—Of the Clergy—Heretics—Vicarages—Mortmain—Statutes of Labourers—Of Pernors of Profits and Uſes—Judicature of the Council—Of the Parliament—Origin of the Court of Equity in Chancery—Court of the Conſtable and Marſhal—Of the Admiral—Court of Exchequer—Statutes of forcible Entries—Of Treaſons—Scandalum Magnatum—Juſtices of the Peace—Statutes of Henry IV.—Election of Members—Of the Clergy—Vicars inſtituted and inducted—Statutes of Labourers—the Parliament and Council—Repeal of Treaſons—Heretics—Multiplication—Pardons to Provors—Inſidiatores Viarum, &c.—the Clergy—the Statute of Additions—and Amendment—Heretics—Forging Deeds—Riots—Truce and Safe-conduct—Actions upon the Caſe—Of Aſſumpſit—the Criminal Law—the King and Government—the Statutes—Reports.

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IN the reign of Edward the Third we took a ſhort view of the law in general, comparing it in many inſtances with its antient ſtate, as delivered by Bracton and the older writers. It ſeemed that a great object would be attained, if a connection and dependence could be ſhewn between the learning of theſe diſtant periods. After this, perhaps, the reader's curioſity about legal hiſtory may be ſomewhat ſated; and he will be contented that the ſubject of the following reigns ſhould be drawn into a ſmaller compaſs, and treated leſs in detail. However, this wiſh to ſet bounds to the reſt of our enquiry muſt be governed by the nature of the materials. The progreſs made in the alteration or improvement of the law by deciſions of courts, is by many, and thoſe very ſhort, ſteps; and to trace theſe with minuteneſs, if at all poſſible, would, when on queſtions not wholly new, be tireſome and unentertaining: but it is very different with ſtatutes; they make a long ſtride at once, and their effect is too diſcernible to be paſſed

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over. It appears therefore incumbent upon a juridical hiſtorian, whatever liberty he may uſe with one part of his materials, at leaſt to ſtate the ſubſtance of ſtatutes with fullneſs and fidelity. Conformably with this idea we ſhall, in the remainder of this work, continue to give the ſtatutes at length, as in the former reigns; but ſhall only mention ſuch adjudged caſes as relate to the new points which were now ariſing in many branches of our juriſprudence.

THE order we ſhall obſerve in the reigns of Richard II. Henry IV. and Henry V. is, firſt, to treat the ſtatutes of each king ſeparately, and then the deciſions of courts altogether. Firſt, of the ſtatutes of Richard II. beginning with thoſe of a miſcellaneous kind, and then going on to the rights of perſons and of property.

Statutes of Richard II.

A STATUTE was made in the 21ſt year of the king, to annex to the county of Cheſter certain forfeit lands which had belonged to the earl of Arundel; and it was at the ſame time enacted, that the county of Cheſter ſhould thenceforward be called *the Principality of Cheſter*, and ſhould always go to the king's eldeſt ſon, with the rights and franchiſes thereto belonging (*a*).

IN order to ſecure the regular attendance of perſons in parliament, it was thought fit to make a ſtatute, in the 5th year of the king (*b*), ordaining, that all perſons and commonalties, which from thenceforth ſhould have ſummons to come to parliament, ſhould attend as they were bound to do, and had formerly done: and it was enacted, that if any ſo ſummoned, whether archbiſhop, biſhop, abbot, prior, duke, earl, baron, banneret, knight of the ſhire, citizen of city, burgeſs of borough, or other ſingular perſon or commonalty, abſented himſelf (unleſs he could reaſonably and honeſtly excuſe himſelf to the king), he ſhould be amerced, and otherwiſe puniſhed, as formerly: the ſame of ſheriffs who were negligent in making returns of parliamentary writs, or left out of the returns any cities or boroughs which were bound, and formerly were wont to come to parliament. The election and return of members to ſerve in parliament, were further conſidered in the two ſubſequent reigns. In the 12th year of the king, an act was made to remove ſome doubts which were entertained about the levying of the expences of knights of the ſhire upon lands held by lords. To ſettle this, it was enacted, that they ſhould be levied as formerly, with this conſideration, That if any lord, or any other man, ſpiritual or temporal, had purchaſed lands or tenements, or other poſſeſſions, which were con-

(*a*) Stat. 21 Ric. II. c. 9. (*b*) Stat. 2. c. 4.

tributory

tributory to ſuch expences before the time of the purchaſe, they ſhould continue contributory as before.

THE feudal bond between lord and vaſſal had been of late years growing weak; and we find now, that villains and land tenants had begun to break out into violent demands for an exemption from the ſervitude in which they were held by their tenures. In the firſt year of this king's reign a ſtatute (*a*) was made, ordaining commiſſioners to enquire into theſe differences. It ſeems, that many of theſe claims were pretended to be founded on the evidence of Domeſday-book, which was nothing more than claiming, in another language, to be put on the condition of landholders in the time of Edward the Confeſſor, the cry that had been kept up in the early times of the Norman conſtitution. Theſe matters, as far as the claim of right went, were referred to the examination of the parliament, while the juſtices of the peace were commiſſioned to ſuppreſs the tumults and outrage committed by the claimants. The impatience expreſſed by theſe inferior landholders might be encouraged by the antient title which they now ſeemed to poſſeſs in their lands. Inſtead of the precarious holding at the abſolute will of the lord, as originally, we find in the latter end of the laſt reign, mention of *tenants by copie of court roll*; which indicates, that villenage was, in ſome places at leaſt, become of a more ſtable nature, and the tenants enabled to ſet up a ſpecies of *title* againſt their lord. However, this tenure *by copy* is not mentioned in the old book of tenures, nor does any diſcuſſion upon it appear in the reports of Edward III. We muſt therefore wait till a later period, when it was more generally acknowledged, for a better account of this new tenure.

Copyholds.

THE condition of the times, and the turn of manners which then prevailed, made it deſirable and neceſſary for great lords to ſupply this defection in their tenants by other expedients. It became the cuſtom to *retain* perſons in their ſervice, to be at call, when their lords affairs needed their ſupport; and to diſtinguiſh different partiſans, as well as to give a ſplendour to the confederacy, they uſed to dreſs them in *liveries*, and *hats* of a particular make or colour. This ſpirit of party became very general. Beſides thoſe who were retained by great men, fraternities uſed to be formed of perſons concurring in the ſame ſentiments and views, who would bind themſelves to ſupport each other on all occaſions, and denoted their union by ſimilarity of dreſs. Thus, the country every where abounded either with

Statutes of liveries.

(*a*) Stat. 1 Ric. II. c. 6.

the

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the adherents of great men, or ſocieties which were ready to become ſuch; and perſons of weight and influence could never want a ſet of determined followers to maintain and abet them in any violence or ſcheme of ambition. Theſe confederacies became a terror to the government, and were the occaſion of the *ſtatutes of liveries* paſſed in this and the following reigns. The firſt of theſe is ſtat. 1 Ric. II. 2. c. 7. which ordains, that no livery be given by any man for maintenance of quarrels and other confederacies, upon pain of impriſonment and grievous pain to the king. This ſtatute ſpeaks of *eſquires*, as well as others, being the ſort of people who were uſed to be retained in this way. By ſtat. 16 Ric. II. c. 4. it was provided, that no yeoman, nor other of lower eſtate than an *eſquire*, ſhould uſe or bear livery, called *livery of company*, of any lord, unleſs he was menial and familiar, and continually dwelling in the lord's houſe. There is no earlier mention of an eſquire than in theſe acts: it ſeems to have been not a very high rank in the orders of ſociety, being next above a yeoman (*a*). As the giving of liveries was a matter in which *the peace* was principally intereſted, we find in ſtat. 20 Ric. II. c. 1. for enforcing the ſtatute of Northampton, and declaring *lancegaies* and armour, to be unlawful a clauſe ordaining that no lord, knight, nor other ſhould go, or ride, armed, by night or by day, nor bear pallet nor ſkull of iron, nor of other armour, except the king's officers and miniſters; and moreover, that the above ſtatutes of liveries and hats ſhould be obſerved. The cogniſance of theſe ſtatutes was firſt ſubmitted to the juriſdiction of the juſtices of aſſiſe, and afterwards to that of the juſtices of the peace.

NOTWITHSTANDING the precarious authority which Richard held among his contending nobles, he maintained with firmneſs the oppoſition begun by Edward III. to clerical uſurpations. New ſtatutes of proviſors were enacted; while the independence of the national church was vindicated, ſome ſteps were made towards preventing the bad effects of *appropriations*; and ſome regulations were made for the ſecurity of tithes, and the perſonal privilege of clerks. We ſhall mention theſe proviſions in the order in which they were made.

THE firſt act relating to the clergy was ſtat. 1 Ric. II. c. 3. which gives prelates and clerks an action of treſpaſs againſt purveyors to recover damages for a breach of any of the ſtatutes made in the laſt reign againſt thoſe op-

(*a*) The *Franklein*, as deſcribed in a cotemporary work, I mean Chaucer's Canterbury Tales, ſeems to have been a higher order of yeomen; ſuch as a *wealthy farmer*, or *gentleman farmer*. Vid. Canterb. Tales.

preſſors

preſſors of the people. This was, becauſe they could not by any of thoſe acts proceed criminally againſt purveyors. Complaint was made, that indictments uſed to be preferred againſt the prelates and clergy ſuing for their right in the ſpiritual court, and even againſt the ſpiritual judge for entertaining the ſuit; and under colour of ſuch indictments they uſed to be impriſoned, and otherwiſe vexed, till they entered into obligations and promiſes to deſiſt from their ſuits. It was enacted by the ſame ſtatute, ch. 13. that ſuch obligations ſhould be void; that the procurers of ſuch indictments, if the party was acquitted, ſhould be proſecuted as directed by ſtat. Weſtm. 2. ſt. 1. c. 12. and that the juſtices before whom the acquittal was, ſhould have power to enquire of ſuch procurers, and puniſh them as they deſerved. Again, it was provided by the following chapter of the ſame act, that where an action for goods taken and carried away was brought for tithes againſt a parſon, and he pleaded that it was a matter of tithes belonging to his church, the general averment ſhould not be taken without ſhewing ſpecially how they were his lay chattel. Complaint was made in the laſt reign, of prieſts being arreſted in church, and a general proviſion had been made to prevent it; but now it was more ſpecially ordained, that any of the king's miniſters ſo doing ſhould be impriſoned, and pay a fine to the king, and compenſation to the party; only this was not to extend to clerks who held themſelves within churches or ſanctuaries by fraud or colluſion. The perſons intitled to this privilege are thus deſcribed by the preamble of the ſtatute: Clerks in cathedral or other churches, or churchyards, and thoſe bearing the body of our Lord to ſick perſons.

NOTWITHSTANDING the ſtatutes made in the laſt reign (*a*) to reſtrain the gifts of church-benefices to aliens, that practice ſtill continued; and many livings being held by foreigners, all the ill conſequences following from non-reſidence were miſerably felt. A new act was now made to prevent, if poſſible, this deſtructive practice. It was enacted by ſtat. 3 Ric. II. c. 3. in the moſt explicit terms, that no one, without the licence of the king, ſhould receive procuracy, letter of attorney, ferm, or other adminiſtration of any benefice within the realm, from any perſon, except the king's liege ſubjects. As foreign incumbents could not manage the revenues of their benefices but by ſome of the above means, it was intended hereby to make them ever after unproductive to the poſſeſſor. It was moreover ordained,

(*a*) 25 Ed. III. ſtat. 6. Vid. ant. 62.

that

that every one who had accepted ſuch procuracy or adminiſtration from aliens, ſhould abandon it within forty days after publication of this act. None were to convey money or other things out of the realm for the uſe of ſuch alien incumbents. If any was guilty of a breach of this act, he was to incur the penalties of the ſtatute of *proviſors*, 27 Ed. III. by the proceſs ordained in that act; in addition to which proceſs it was now ordained, that ſhould the offenders be out of the realm, and not beneficed, nor have any poſſeſſions within the realm where they might be warned, that then a writ ſhould be made in the chancery grounded upon this ordinance, directed to the ſheriff of the county where they were born, returnable in one bench or the other; which writ was to iſſue at the king's ſuit. This writ was to command, that proclamation be made for them to appear at a certain day in the bench where the writ was returnable, at the diſtance of half a year, to anſwer the matters contained in the writ; and, upon the return thereof, the juſtices were to proceed in the above form. It was alſo ordained, that no biſhop ſhould meddle with the benefice of ſuch alien, by ſequeſtration, or in any other manner.

It is ſaid (*a*), that the lords ſpiritual did not aſſent to this ſtatute; which, it may be obſerved, is all through termed an *ordinance*. Indeed, the higher clergy were not much intereſted to ſuppreſs this practice; as they ſtill enjoyed their biſhopricks, and might have views at the court of Rome, which would be favoured by a connivance at practices ſo advantageous to the Pope and his adherents. But, though theſe pious prelates did not contribute their ſanction to a national proviſion for the maintenance of alms and piety, they were not aſhamed to palm upon the nation an ordinance of their own as a legiſlative act, though the conſent of the commons was never taken. But this was a caſe in which their influence and dignity were concerned, and where they did not think it wiſe to be over-ſcrupulous. The act alluded to is ſtat. 5 Ric. II. ſt. 2. c. 5. which was levelled at the followers of *Wickliffe*, who by their lives and doctrines, as well as by their numbers, had become a terror and reproach to the higher orders of the church. Theſe people are deſcribed as perſons who went from town to town, under pretence of great holineſs, and without the licence of the ordinary, or other authority, preaching daily in churches, churchyards, markets, fairs, and other open places, uttering in their ſermons hereſies and notorious errors. To give greater

Heretics.

(*a*) Vid. Cott. Abri.

colour

colour to violent meaſures, it is added, that they preached divers matters of ſlander, to engender diſcord and diſſenſion between divers eſtates of the realm. Theſe preachers had been frequently brought before the biſhops, but without their admonitions producing any effect. To make quick work, it was now ordained, that the king's commiſſions ſhould be directed to the ſheriffs and other officers, or other learned perſons, and according to certificates from the biſhops, to be made in the chancery from time to time, to arreſt all ſuch preachers, with their maintainers and abettors, and hold them in priſon till they would juſtify themſelves according to the law and reaſon of holy church: thus was the ſecular power to be let looſe upon the followers of *Wickliffe*, whenever it ſeemed good or expedient to the biſhops. This proviſion was highly reſented by the commons; who in the next year declared, they meant not to bind themſelves and their heirs to the prelates, any more than their anceſtors had done; and that they therefore never conſented to the law: it was accordingly revoked by the king (*a*).

In the ſeventh year of the king, the ſubject of *alien-incumbents* was again taken up; the ſtatute made in the third year was confirmed; and it was moreover enacted by ſtat. 7 Ric. II. c. 12. that the proviſions of it ſhould extend to all aliens purchaſing, or who had purchaſed benefices; and they were likewiſe to incur the penalties of ſtat. 25 Ed. III. ſtat. 5. c. 22. made againſt thoſe who purchaſed proviſions of abbies or priories. The king likewiſe commanded all perſons to abſtain from praying of him licences for ſuch purchaſes. To facilitate the execution of this and the former ſtatutes, it was the ſame year ordained (*b*), that perſons againſt whom writs of *præmunire facias* were ſued, and who were then out of the realm, or ſhould go out of the realm by the king's licence, if they were of good fame, might appear by attorney. Theſe practices of the churchmen were purſued ſtill further by the legiſlature. In ſtat. 12 Ric. II. c. 15. it was ordained, that no liege-man ſhould go or ſend out of the realm, by licence or without (unleſs he had the ſpecial leave of the king himſelf), to provide or purchaſe for him a benefice; and that any ſuch perſon ſhould be conſidered as out of the king's protection, and the preſentation be void. Again, by ſtat. 13 Ric. II. ſtat. 2. c. 2. the ſtat. 25 Ed. III. was confirmed; and it was moreover enacted, that if any one accepted a benefice contrary to that act, and was beyond ſea, he ſhould remain exiled and baniſhed out of the realm for

(*a*) Cott. Abri. p. 285. § 52. (*b*) Ch. 14.

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ever; and his lands and tenements, goods and chattels, forfeited to the king: if within the realm, he was to leave it within ſix weeks next after his acceptance, and remain baniſhed for ever; and any one receiving ſuch baniſhed perſon was to be puniſhed in the ſame manner. It was moreover provided, if any one ſent or ſued to the court of Rome, whereby any thing was done contrary to this act; ſuch offender, if a prelate, ſhould forfeit one year's value of his temporalties; if a temporal lord, the value of his lands and poſſeſſions not moveable, for a year; if any inferior perſon, he was to pay the value of the benefice for which ſuit was made, and be impriſoned for a year. But if any man brought or ſent within the realm, or within the king's power, any ſummons, ſentences, or excommunications againſt any one for the cauſe of making motion, aſſent, or execution of the ſaid ſtatute of *proviſors*; he was to be taken, arreſted, and put in priſon, forfeit his lands and tenements, goods and chattels, for ever, and incur the pain of life and member. If any prelate made execution of ſuch ſummons, his temporalties were to be taken into the king's hands, till due redreſs and correction was made therein; and a perſon of leſs eſtate was to be impriſoned, and make fine and ranſom according to the diſcretion of the king's council (*a*).

THE two laſt acts ſtruck deep into the papal authority, and were viewed not without jealouſy by the biſhops, who were thus gradually withdrawn from the protection of the papal ſee, and left to the common courſe of the laws. To ſhew their apprehenſions on this ſubject in a way that would carry the moſt gracious appearance, they preſerved a ſilence reſpecting themſelves, but ventured to diſcover all concern for the intereſt of the Pope. Towards the cloſe of this parliament, we find the archbiſhops of Canterbury and York for themſelves, and the whole clergy of their provinces, made their ſolemn proteſtation in open parliament, that they in no wiſe meant, nor would aſſent to any ſtatute or law made in reſtraint of the Pope's authority, but would utterly withſtand the ſame; which proteſtation was at their deſire enrolled (*b*).

HOWEVER, on another occaſion, the clergy acted in conformity with the wiſhes of the commons, though with a reſervation of their opinion. This was at the paſſing of ſtat. 16 Ric. II. c. 5, which ſubjected thoſe who purchaſed bulls from Rome to a *præmunire*. The ſtatute is introduced by a

(*a*) Ch. 3. (*b*) Cott. Abri. p. 332. § 24.

long

long preamble, which ſtates, That all the lords, both ſpiritual and temporal, had been ſingly aſked in parliament, whether they would ſupport the king in maintaining his authority againſt the Pope's bulls, which were purchaſed to prevent the execution of judgments paſſed in the ſecular courts about advowſons. The temporal lords declared ſuch interference to be a violation of the old eſtabliſhed law of the land; and the lords ſpiritual having made proteſtation that it was not their mind to deny nor affirm that the biſhop of Rome may not excommunicate biſhops, or make tranſlations of prelates, after the law of holy church (the doing this without the king's conſent being one of the grievances now complained of, and upon which they had been queſtioned in the ſame manner as upon the other); they ſaid, that cenſures of excommunication againſt any one for executing the proceſs of the king's courts were *againſt the king and his crown.* It was therefore enacted, that if any purchaſe or purſue, or cauſe to be purchaſed or purſued, in the court of Rome or elſewhere, any ſuch tranſlations, proceſſes, ſentences of excommunication, bulls, inſtruments, or any other thing againſt the king's crown and dignity; or receive, or make notification, or any other execution within the realm, or without; they, their notaries, procurators, maintainers, abettors, and counſellors ſhould be put out of the king's proteſtion; and their lands and tenements, goods and chattels, forfeit to the king. Such offenders were to be attached, if they could be found, and brought before the king and his council, or proceſs of *præmunire* was to be awarded, as in other caſes of proviſors, and of thoſe who ſued in any court in derogation of the king's royalty.

Vicarages.

WHEN the incurſions of a foreign eccleſiaſtical power were repreſſed, it remained to provide for the internal welfare of our own church, which could not be better effected than by ſecuring a competent maintenance to the parochial clergy. The manner in which the clerical office was diſcharged, and the ſtate of dependence and poverty in which the labouring part of the prieſthood were kept, through the practice of appropriations, particularly thoſe of the monaſteries, called aloud for the interpoſition of the legiſlature. Penſions, which had been put under the ſole cogniſance of the biſhops by ſtat. *Articuli Cleri* of Edward II. had thereby ſuffered ſome reſtraint; and having been lately condemned as uncanonical by a decree of Pope Clement the Third, the patrons of church-benefices were ſet upon practiſing more frequently the ſtratagem of appropriations. Inſtead therefore of exacting arbitrary rents and penſions from the poor clergy whom

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they had preſented to benefices, they got into the habit of taking the whole profits of ſuch livings into their own hands, by a licence *to appropriate*; and after that, they provided for the cure of the pariſh (being only a ſecondary concern) in ſome other way. The monks who enjoyed ſuch appropriations, ſometimes reſided on the cure, and officiated by turns: this they performed by ſome ſettled rotation among themſelves; and, as it was a burthen, the ſervice was not unfrequently impoſed as a penance. A duty diſcharged in this way was, on many pretences, ſhifted from one to another: theſe changes produced intermiſſions and neglect in the paſtoral care, and occaſioned great ſcandal. As a remedy for this, the monks would depute ſome perſon to do the duty regularly, upon a ſcanty ſalary; and this was the uſual practice with lay-patrons, as the only method by which they could ſerve the cure. The miſerable ſubſiſtence of theſe curates could not fail of bringing their perſons and office into great contempt. The biſhops had interpoſed in order to correct theſe abuſes; by degrees they reſtrained the monks from taking upon themſelves the cure of ſouls, and obliged them to retain fit and able deputies, with competent ſalaries annexed to their appointment. Theſe were called *curates*, *vicars*, or *capellans*, according to the notions prevailing in different places. The injunctions of the biſhops were now ſeconded by the legiſlature. An act was made in this reign, with a deſign of putting this inſtitution of vicars and curates upon a more permanent eſtabliſhment, and alſo to provide for a due application of ſuch portion of the profits of benefices as was deſigned for alms and hoſpitality; for it was enacted by ſtat. 15 Ric. II. c. 6. That in every licence to be made in the chancery for the appropriation of a pariſh church, it ſhould be expreſly contained therein, that the dioceſan of the place, upon the appropriation of ſuch churches, ſhould ordain, according to the value of the churches, a convenient ſum of money, to be diſtributed yearly, of the fruits and profits thereof, to the poor pariſhioners, in aid of their living and ſuſtenance; *and alſo, that the* VICAR *be well and ſufficiently endowed.* The parliament went no further at preſent than to make this general injunction, which was more particularly explained and enforced in the next reign.

Mortmain.

BEFORE we diſmiſs the ſubject of the clergy and clerical poſſeſſions, it will be proper to take notice of a new ſtatute of mortmain enacted in this reign. The ingenuity of the eccleſiaſtics was ſtill employed in deviſing methods to evade the reſtraints of the mortmain-act. One of their contrivances was to conſecrate land, as for a burying-ground, and under that pretence they

they purchaſed conſiderable property in mortmain. This uſed to be done without the licence of the king or chief lords, merely by authority of *bulls* from Rome. As this was a ſort of device which ſeemed to be within the *arte vel ingenio* of the ſtatute of mortmain, the parliament, by ſtat. 15 Ric. II. c. 5. declared it ſo to be, as likewiſe the purchaſe of lands *to the uſe* of religious perſons. This act alſo declared, that the ſtatute of mortmain ſhould be extended to lands, tenements, fees, advowſons, and other poſſeſſions, purchaſed to the uſe of *guilds* and *fraternities*; and becauſe mayors, bailiffs, and the commonalty of cities, boroughs, and other towns, which have a perpetual commonalty, and others that have offices perpetual, were *as perpetual* as religious inſtitutions; it was declared, that any purchaſes by them, or *to their uſe*, ſhould be within the ſtatute of mortmain. Thus was the jealouſy originally excited by the wealth of the clergy now felt in reſpect to lay corporations, and they were ſubjected to the ſame reſtraints in making purchaſes of lands and tenements. Another ſtratagem practiſed by eccleſiaſtics, was to get their villains to marry free women who had inheritances, ſo that the lands might come to their hands by the right which the lord had over the property of their villains. The commons, in the 17th year, petitioned againſt this contrivance: the anſwer given was, that ſufficient remedy was provided by the ſtatute (*a*); meaning, probably, the words *arte vel ingenio*, in the ſtatute of mortmain; which, however, had been found ſo ineffectual in other inſtances.

Statutes of labourers.

THE ſtatutes of labourers, made in the laſt reign, were confirmed, and further regulations were made on this ſubject. The lower orders of people were, in conſideration of law, divided into *ſervants*, *labourers*, *artificers*, and *beggars*; and different regulations were provided for them, as they came under one or other of theſe deſcriptions. One great point in the policy of managing *ſervants* and *labourers*, was to prevent their wandering from place to place. It was enacted, by ſtat. 12 Ric. II. c. 3. that no ſervant (either man or woman) ſhould depart at the end of his ſervice out of the hundred, rape, or wapentake where he dwelt, to ſerve or dwell elſewhere; unleſs he brought a letter patent, containing the cauſe of his going, and the time of his return, if he was to return, under the king's ſeal; for which purpoſe a ſeal was to be in the keeping of ſome good man of the hundred, city, or borough, at the diſcretion of the juſtices; and a ſervant or labourer found wandering without ſuch letter was to be put in the ſtocks, and there kept

(*a*) Cott. Abri. p. 355. § 32.

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till he had found ſurety to return to his ſervice, or to ſerve or labour in the town from whence he came. Perſons receiving ſuch wanderer not having a letter, were to be fined by the juſtices, if they harboured him more than one night. *Artificers*, and perſons of myſteries that were not very needful, were to be compelled to work at harveſt-time. The wages of labourers (*a*) in agriculture were fixed by ſtatute; and thoſe giving or taking more were ſubjected to the penalty of paying the value of what they gave or took beyond the ſtated wages: for the third offence, the taker, if he had not wherewith to pay, was to be impriſoned for forty days. In order that there might always be hands to do country work, it was ordained (*b*), that all men and women who had been uſed to labour at the plough and cart, or other ſervice or labour in huſbandry, till they were twelve years of age, ſhould abide at the ſame without being put to any myſtery or handicraft; and all covenants of apprenticeſhip to the contrary were declared void. To prevent diſorders, it was ordained (*c*), that no ſervant, labourer, nor artificer ſhould carry a ſword, buckler, or dagger, under pain of forfeiting the ſame, except in time of war, or when travelling with their maſters; but they might have bows and arrows, *and uſe them on Sundays and holy-days*; and leave all playing at tennis or football, and other games called coits, dice, caſting of the ſtone kails, and other ſuch *importune games*: and all offenders againſt this ſtatute might be arreſted by ſheriffs, mayors, bailiffs, and conſtables, and their arms taken away. This is the firſt ſtatute that prohibited any ſort of games and diverſions.

Thus far of ſervants, labourers, and artificers, being the induſtrious part of the lower claſs of people. Next, as to *beggars*. It was enacted (*d*), that perſons who went begging, and were able to ſerve or labour, ſhould be treated as thoſe that departed out of the hundred without letters teſtimonial; and beggars *impotent to ſerve*, were to abide in the cities and towns where they were dwelling at the time of the proclamation of this ſtatute; and if ſuch towns were not able to provide for them, they were then to draw themſelves to other towns within the hundred, *or* to towns where they were born, and there continue during their lives. Thus we find no other proviſion for the poor than begging within a certain diſtrict. This idea of proviſion might be encouraged by the plan on which church benefices and religious houſes were bound to diſpoſe of part of their incomes. A certain

(*a*) Ch. 4. (*b*) Ch. 5. (*c*) Ch. 6. (*d*) Ch. 7.

portion

portion of every living was for the maintenance of alms and hoſpitality, the proper diſpoſal of which, we have ſeen, was ſecured by a ſtatute in this reign; and the gates of religious houſes were daily attended by troops of beggars, who received a regular donation of food, and ſometimes of money. This inſtitution, no doubt, contributed to increaſe the number of idle beggars, and made it neceſſary for the legiſlature to obſerve a diſtinction between thoſe who were able to ſerve or labour, and thoſe who were impotent. The concluſion of this act makes mention of two very remarkable ſorts of beggars, which is worthy of obſervation, as it marks, in a particular way, the manners of the times. It enacts, that all thoſe who go *in pilgrimages* as beggars, and are able to travel, ſhall be treated in the ſame manner as ſervants and labourers, if they have no teſtimonial of their pilgrimage under the great ſeal; and that *ſcholars* of the univerſity who went begging in that way, ſhould have letters teſtimonial of their chancellor, under the penalty of being treated in the ſame manner. The going on pilgrimages is mentioned more than once, in the ſtatutes of this time, as a diſſolute cuſtom in all ſorts of perſons, and was particularly ſo when made a pretence for beggars wandering about the country.

ANOTHER ſet of wandering beggars were perſons returning from abroad, or pretending to be returning to their own houſes. It was required *(a)*, that all ſuch perſons ſhould have letters teſtimonial of their captains, or of the mayors or bailiffs where they arrived: and the mayors and bailiffs were to inquire of them where and with whom they had lived, and where they had dwelt in England; and then make them letters patent under the ſeal of their office, teſtifying the day of their arrival, and where they had been, according to their own account. The mayors and bailiffs were to cauſe them to ſwear, that they would hold their right way towards their country, except they had letters patent under the great ſeal to do otherwiſe. If any ſuch perſon was found travelling without his teſtimonial, he was to be treated in the manner that ſervants and labourers were. Thus were vagabonds to be *paſſed* to their own home. In the above regulations we ſee the firſt outline of our preſent ſyſtem of poor laws: the courſe here traced out was amended and corrected by ſubſequent ſtatutes as occaſion required, or later experience pointed out defects, till the whole was reconſidered in the reign of queen Elizabeth, and thrown into one principal ſtatute *(b)*.

(a) Chap. 8. (b) That is, 5 Eliz. to which may be added the ſtatute of the ſame reign about vagabonds.

THERE

THERE was an alteration made in one of the above acts, by ſtat. 13 Rich. II. c. 8. Upon conſideration it was thought adviſeable not to let the rate of wages continue as fixed by that ſtatute, which, by the alteration in the prices of proviſions, might become very hard and inadequate; and therefore by this new act, the juſtices in two ſeſſions between *Eaſter* and *St. Michael* were to make proclamation, according to the dearth of victuals, how much every maſon, carpenter, tiler, and other craftſman, workmen, and other labourers, ſhould take by the day, as well in harveſt as in other parts of the year.

HAVING diſpoſed of the ſtatutes relating to the rights of perſons, we come now to thoſe on private rights, and the adminiſtration of juſtice. The ſtatute made in the laſt year of Edward III. againſt fraudulent gifts of lands and goods to avoid the executions of creditors, was followed up by two others of a ſimilar nature, enacted in the firſt two years of this king. The ſtat. 1 Ric. II. ſt. 2. c. 9. went further, and aimed at theſe colluſive tranſactions, when practiſed for other purpoſes than defrauding creditors. It was complained, that many people having right and title to lands, tenements, and rents, and alſo to perſonal actions, were delayed of their rights and their actions, becauſe the occupiers and defendants commonly made gifts and feoffments of their lands and tenements in queſtion, and of their goods and chattels, to lords and other great men of the realm, againſt whom the claimants dared not make ſuit. Again, many diſſeiſins were committed; and immediately after the diſſeiſors would make alienations and feoffments, ſometimes to lords and great men of the realm, to have maintenance; and ſometimes to perſons whoſe names were wholly unknown to the diſſeiſees, in order to delay them from their recovery. To remove theſe miſchiefs, it was ordained, in the firſt caſe, that ſuch feoffments and gifts of lands and goods ſhould be void; and, in the ſecond caſe, that the diſſeiſees ſhould have their recovery againſt the firſt diſſeiſors, as well of the lands and tenements as of their double damages, without having regard to ſuch alienations, ſo that the diſſeiſees commenced their ſuits within a year next after the diſſeiſin. And this was to hold in every plea of land where feoffments were made by fraud and colluſion, ſo as recovery might be had againſt the firſt feoffor; tho' this was to be underſtood where ſuch feoffors *took the profits*.

Of perſons of profits & uſes.

WHEN perſons making ſuch feigned gifts withdrew into privileged places, and there continued taking the profits of their lands and goods, it was enacted, by ſtat. 2 Ric. II. ſt. 2. c. 3. in all caſes *of debt*, that, after the

the *capias* was awarded, and the ſheriff returned, that he had not taken the defendant, becauſe he had fled to a privileged place, another writ ſhould iſſue, commanding proclamation to be openly made at the gate of the place, by five weeks continually, once a week, admoniſhing the party to appear at a certain day before the juſtices, to anſwer to the plaintiff; and if the party came not in perſon, or by attorney, judgment was to be had againſt him for the ſum in demand, and, after the colluſion and fraud proved, execution levied of ſuch lands and goods as he had out of the privileged place.

These gifts of land, which are termed colluſive and fraudulent, were a modification of real property that was now growing very common, and was better known afterwards, under the title of *gifts to a uſe*. The legal poſſeſſion of land by one man while another enjoyed it, and was intitled to the profits, ſeems to have been not unknown before this reign; tho' it had lately become more common, and had begun to undergo ſome diſcuſſion. The idea upon which they made this diviſion between the land and the profit, was that of raiſing a *truſt*; namely, when a man would confide in the conſcience of another with more ſecurity than in his own poſſeſſion. This was likely enough to happen at all times and in all places, and muſt be recogniſed more or leſs by all laws. There is mention of ſuch uſes very early in our law. When an anceſtor infeoffed his eldeſt ſon, in order to avoid the claim of guardianſhip, he, no doubt, retained a right to the profits during his life: but when the effect of ſuch feoffments was taken away by the ſtatute of Marlbridge, ſuch uſes were no longer reſorted to, or thought of. It became an opinion in later times than thoſe of which we are writing *(a)*, that, after the ſtatute of *Quia emptores*, if a feoffment was made without conſideration, the uſe reſulted to the feoffor; and therefore, that the origin of uſes is to be aſcribed to that period. But, without ſtraining one's fancy after conjectures, there are ſome ſcattered notices of an early period clearly evincing, that land might be in the ſeiſin of one perſon, while a right to the emoluments was in another. To ſay nothing of the ſtatute of Kilkenny made in the reign of Edward II. in which act there is mention of ſuch ſecret feoffments, we find, in the 8th year of Edward III. where a fine was levied by conſent, the entry of the conuſee was ſaid to be *en auter droit (b)*. Towards the cloſe of that reign, we find a caſe where the feoffees were ſued by a petition to the king *(c)*. In the 2d year of Richard II. we find a caſe in

(*a*) Hen. VIII. vid. : (*b*) 8 Aſſ. (*c*) Bro. Feof. al Uſe, 9.

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parliament, which fully ſhews the ſtate and manner of theſe gifts. It there appears, that Edward III. had infeoffed the duke of Lancaſter and others in fee by deed, and cauſed livery of ſeiſin to be made without any condition whatſoever. Long after, the king, by verbal declaration, prayed the feoffees, that they would, out of the lands, provide for the friars of Langley, and certain other religious perſons. It was now demanded, in full parliament, of all the judges and king's ſerjeants, whether ſuch ſubſequent charge to the feoffees ſhould be adjudged by law a *condition*, and ſo make the feoffment *conditional*; and they were of opinion, as nothing was ſaid before, nor at the time of the gift, nor yet upon the livery, that the king's requeſt afterwards could not make a *condition (a)*. Other examples there are of ſuch gifts, and a declaration to apply the produce of them to other purpoſes than the intereſt of feoffees, and they are invariably conſidered as *conditions*, and in that light were pronounced to be good or bad *(b)*.

Among theſe inſtances, to conteſt for the origin of uſes is diſputing for words. Whether they were called *conditional enfeoffments*, entries *en auter droit*, or the like, the thing was certainly underſtood before the time of Richard II. tho' the ſtatute 50 Edw. III. which ſays, that lands ſo colluſively given ſhould be liable to the execution of creditors, *if they took the profits* by that phraſe, ſeems to come nearer to the proper idea of uſe, as ſince underſtood, than any thing before in the annals of the law. The earlieſt mention of this kind of property under the *name* of a *uſe* is in the reign of Richard II. when there is the firſt evidence, that the words *ad opus et uſum* got into deeds and aſſurances of land *(c)*. We alſo find in the ſtatute of proviſors, 7 Ric. II. c. 12. the term *uſe*; and more explicitly in the ſtatute of mortmain, 15 Ric. II. c. 5. The poſſeſſion of land *to the uſe of another*, is ſpoken of in the ſame language that was ever after held on this ſubject.

An uſe, as now underſtood, was when a man infeoffed another to the uſe of himſelf, or of a third perſon: in this caſe, while the feoffee was ſeiſed of the land, the feoffor, or third perſon, was ſeiſed of the uſe. The motives for throwing property into this ſhape were many and powerful. A perſon conſcious that his land was liable to forfeiture for any crime, or to the burthen of ſome legal charge, might rid himſelf of both by diſpoſing of his land to another who was in a better condition than himſelf, and reſerve to himſelf only the uſe of it, a property not liable to the like incumbrances.

(*a*) Cott. Abri. p. 169. § 26. (*b*) Ibid. p. 185. § 25, &c. (*c*) Bacon's Reading on Stat. Uſes.

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This invention is by ſome attributed to the eccleſiaſtics, who practiſed it to evade the ſtatute of mortmain; for the prohibition to take *land* being held no prohibition to take *the uſe* of it, when an alienation in mortmain was deſigned, it was adviſed to infeoff ſome perſons *to the uſe* of the religious perſons intended to be benefited, who thereby became ſeiſed of the uſe. Whether the churchmen were the firſt who ſuggeſted the idea of dividing the profits from the land, it is certain that the term *uſe* (as far as we can judge from the ſtatute book) was firſt applied to their tranſactions, as appears by the ſtatutes before mentioned concerning proviſors and mortmain (*a*). If this was the origin of uſes, many reaſons concurred for adopting the device; reaſons of more common and frequent application than alienations in mortmain. Beſides thoſe of forfeitures and legal liens, the power of deviſing a uſe, at a time when the owner had not the ſame power over his land, contributed, perhaps, more than any thing to make this ſort of property deſirable (*b*).

This diſpoſition of property, though a novelty in the law, was not incompatible with any known rule; and if a perſon ſeiſed of land might give it in one way, there was no reaſon why he might not give it in another. Conformably with ſuch general principles of equity, theſe gifts, though not capable of being enforced by any common-law proceſs, were equally with many other queſtions deſerving the cogniſance of the ſupreme tribunal, and were accordingly brought before the parliament by petition to the king. While uſes were created upon deliberation, as a mode of ordering property more ſuitable to the views of the owner than a conveyance at common law, they were intitled to the equitable conſideration they received from the parliament. But we find that they were ſometimes reſorted to for other purpoſes: a debtor, in the agony of ſome preſſing occaſion, would transfer his property in this way, in order to avoid the proceſs of the law. In ſuch inſtances, *a uſe* became a fraudulent and colluſive tranſaction; and the legiſlature provided a remedy againſt the effect of it by the ſtat. 50 Ed. III. and the two ſtatutes of this reign before mentioned. When *a uſe* was reſorted to as a medium by which land could be conveyed to a religious houſe, it was tranſacted with more conſideration as well as more ſecrecy than the former; and the injury, if any, was more remote than that of withdrawing property from the execution of creditors. It was not therefore till the 15th year of this reign, that the legiſlature impoſed any reſtraint

(*a*) Vid. ant. 242. (*b*) Bac. Tracts, 316.

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upon ſuch gifts, and then a ſtatute of mortmain was made to reſtrain them. It was enacted (*a*), that all thoſe who were poſſeſſed by feoffment, or other manner, *to the uſe* of religious people, or other ſpiritual perſons, of lands and tenements, fees, advowſons, or any other manner of poſſeſſion to amortiſe them, and whereof the ſaid religious and ſpiritual perſons *take the profits*, ſhould cauſe them to be amortiſed within a certain time by the licence of the king and lords, or elſe alien them to ſome other uſe; and all future purchaſes in that way were to be conſidered as within the ſtatute of mortmain. Such was the progreſs of this new ſpecies of property, and this was all the notice that had hitherto been taken of it by the legiſlature.

THE title to dower was conſiderably affected by a ſtatute made in this reign concerning *raviſhment* (which meant no more than what has ſince been called ſtealing) of women. The ſtat. 6 Ric. II. ſt. 1. c. 6. ſays, that the raviſhers of ladies and the daughters of noblemen, and other women, in every part of the realm, were now more violent and more frequent than had formerly been. To take away part of the temptation to theſe diſorders, it was enacted, that whenever ſuch ladies, daughters, and other women aforeſaid were raviſhed, and after ſuch rape conſented to ſuch raviſher, then both the raviſhers and raviſhed ſhould be *ipſo facto* diſabled from claiming any inheritance, dower, or joint-feoffment after the death of their huſbands and anceſtors; but the next of blood to the raviſher or raviſhed ſhould have title immediately after the rape to enter upon the raviſher or raviſhed, and hold the land; and the huſbands or fathers of ſuch women might ſue the raviſhers, and have judgment of life and member, notwithſtanding the women afterwards conſented to ſuch raviſhers; and the defendant was not to be permitted to wage battel, but the truth was to be tried by the country.

Judicature of the council.

THE judicature of the parliament, and even of the council, was exerciſed in all its amplitude, notwithſtanding the attempts made in the laſt reign to bring all cauſes and queſtions from both, and particularly from the latter, to the deciſion of the common law. The ſtatutes then made reſpecting the council, ſeem not to have been obſerved with much ſtrictneſs; for through the whole of this reign ſimilar complaints were repeatedly preferred to parliament. In the firſt year of Richard II. it was prayed, that no ſuits be-

(*a*) Ch. 5.

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tween parties ſhould be *ended* before any lords or others of the council, but before the juſtices only *(a)*. In the following year it was prayed, that no man ſhould anſwer before the council, by writ or otherwiſe, concerning his freehold, but only at the common law: to which it was anſwered, that no man ſhould be *forced to anſwer finally* there, on ſuch matters; though all perſons ſhould be obliged to anſwer before the council concerning *oppreſſions (b)*. Thus, a limit ſeemed to be fixed to the juriſdiction of the council, by allowing it to entertain all ſorts of ſuits commenced originally there by complaint or otherwiſe; but not to determine *finally*, only referring them, as it ſhould ſeem, according to the ſubject of debate, to the different courts of common law. This had been the practice in the laſt reign, and we find inſtances of it continually in this, upon all ſorts of queſtions that could ariſe upon property *(c)*. Beſides the buſineſs that would perpetually engage the council, when it acted in this manner, as ancillary to the judicial determinations of the courts of law, it was laid down by parliament, that *oppreſſions* might be determined there *finally*; and in all times, particularly thoſe of diſorder and change, numberleſs are the cauſes which it might draw to itſelf under the idea of *oppreſſions*; many matters of debate between man and man being liable to that conſtruction.

For the diſpatch of all this buſineſs, we have ſeen, that a regular ſtanding council was eſtabliſhed towards the cloſe of the laſt reign, as a ſubſtitute for the council which the king had about him, by the old conſtitution. The confirmation of this council was more than once prayed by the commons in this reign: they petitioned that he would diſcharge the great council of lords, and appoint about him a ſtanding council, conſiſting of the great officers, as the chancellor, treaſurer, keeper of the privy ſeal, the chief chamberlain, the ſteward of the houſhold, and the like *(d)*. It ſhould ſeem, that this ſtep was at length taken, and that the ſummoning of the great council became leſs frequent, while the ſtanding council gradually aſſumed judicial powers of a very extenſive nature, equal to thoſe exerciſed by the great council of lords. Queſtions, both of a civil and criminal import, were brought before the council, as a regular part of the judicial eſtabliſhment of the kingdom; and beſides the original commencement of ſuits, the judges uſed to adjourn cauſes before the council, if any doubt or difficulty occurred, as they uſed in former reigns to adjourn them into parlia-

(a) Cott. Abrid. p. 162. § 87. *(b)* Ibid. p. 178. § 49. *(c)* Ibid. p. 176. § 34, 35, *et paſſim*. *(d)* Ibid. p. 183. § 12. 3 Ric. II.

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ment. Probably the appointment directed to be made by ſtat. 14 Edw. III. of certain lords and biſhops to decide ſuch adjourned cauſes, was not kept up; and ſuch enquiries being therefore excluded from the parliament, the council was the only ſuperior court that remained for judicial information of that ſort (*a*). It was not this part of the juriſdiction of the council, but the former, that continued to raiſe jealouſies. Theſe at length occaſioned the following ſtat. 17 Ric. II. c. 6. for the ſuppreſſion at leaſt of all *falſe* ſuggeſtions: the chancellor was thereby authoriſed, upon any ſuggeſtion being found, and proved untrue, to award damages according to his diſcretion to the perſon injured.

Of the parliament.

THE parliament ſtill continued to determine cauſes brought before them upon petition, as in the former reign, while their criminal judicature maintained all the authority it ever poſſeſſed. Indeed, there is no period of our hiſtory, in which the criminal judicature was called forth into action ſo frequently; nor was this confined to the perſons of peers, but commoners were equally ſubject to this ſupreme court, notwithſtanding the proteſtation of the lords at the beginning of the former reign (*b*). The courſe of proceeding being various, and none of them quite conſonant to our preſent ideas upon this ſubject, it may be acceptable to the reader to ſee a ſort of report of ſome trials of this kind. To begin with the enquiry inſtituted againſt *Alice Piers:* This lady was brought before the lords, where Sir Richard Le Scrope, ſteward of the houſhold, at the command of the prelates and lords, recited in her preſence an ordinance, which it ſeems had been made in the 50th Edw. III. declaring, that no woman, eſpecially *Alice Piers*, ſhould proſecute any thing in the king's court by way of maintenance, under penalty of forfeiture, and baniſhment out of the kingdom. The ſteward informed the lords, that ſhe had incurred this penalty, and, to ſupport the charge, mentioned two inſtances where ſhe had uſed her interceſſion with the late king, reſpecting ſome appointment in the ſtate. The facts adduced ſeem hardly within the meaning of the ordinance: however, they were held breaches of it; and accordingly, without calling any witneſs to prove what had been alledged, he demanded of her what ſhe could ſay to clear herſelf. She ſaid, ſhe was not guilty, and offered to produce witneſſes who would diſprove the facts. A day was aſſigned for the examination of theſe witneſſes; when, after they had depoſed upon oath what they knew of

(*a*) Cott. Abri. p. 282. § 17. (*b*) Vid. ant.

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the tranſaction, twelve other perſons were called in, who were moſt of them witneſſes, ſays Tyrrell; and they, in the nature of a jury or inqueſt, being ſworn, and charged to ſpeak the truth, whether the ſaid Alice was guilty or not, found her guilty (*a*). This was a mixed and very ſingular proceeding. It was before the lords, tho' ſhe was a commoner; and there was a verdict of a jury, while ſhe was under trial, and was ſentenced by parliament. This was more uncommon than the putting her upon her defence, without calling a witneſs to prove the charge againſt her.

THE method of proſecution by impeachment, which had been firſt exerciſed againſt the lord Latimer in the laſt reign, was purſued in the reign of Richard II. In the 10th of this king there was an impeachment preferred againſt the chancellor Michael de la Pole, promoted by the duke of Gloceſter, who at that time had the houſe of commons at his devotion. In 20th of the ſame reign, the commons impeached the archbiſhop of Canterbury.

THERE was a fierceneſs diſcoverable in all the proceedings of Gloceſter, and the confederate lords, againſt the king's favourites; yet, as ſome of theſe purport to be judicial enquiries, they muſt be taken as ſpecimens of proceeding in criminal proſecutions, and as ſuch deſerve particular notice. When the five lords appealed the archbiſhop of York, the duke of Ireland, Michael de la Pole earl of Suffolk, Robert Treſilian, and Sir Nicholas Bramber, of high-treaſon, they offered to prove their accuſation in the old way; they threw down their gloves, proteſting, on their oaths, to proſecute the charge by battle: but the king referred it to the next parliament, and then it was reſolved that battle lay not in that caſe. Afterwards, articles were exhibited in writing, to the number of thirty-nine, in many of which they were charged with accroaching royal power: the accuſed were ſummoned, but not appearing, their default was recorded: the judgment, however, was deferred till the king and lords had adviſed upon the articles (*b*).

IN the mean time the judges, ſerjeants, and thoſe learned in the common and civil law, were directed to adviſe the lords how to proceed in this appeal (*c*). Their anſwer to the lords was, that the appeal was not made, nor brought, *as the one law or the other required.* Upon this anſwer the lords deliberated, and then declared, that in ſo high a crime as that laid in

(*a*) 3 Tyrr. Hiſt. 834. (*b*) 1 Stat. Tri. 5. (*c*) Ibid. 11.

this

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this appeal, which touched the perſon of the king and the eſtates of the realm, and was perpetrated by perſons who were peers, as well as by others, the cauſe could not be tried any where but in parliament, nor by any law but that of parliament; and that it ſhould be done in this caſe by the aſſent of the king, by the award of parliament; ſince the proceſs of inferior courts was only as they were intruſted with the execution of the antient laws and cuſtoms of the realm, and the ordinances and eſtabliſhments of parliament; and they declared that this appeal was well brought.

ACCORDINGLY, upon the default of the firſt four defendants, they were adjudged guilty of the treaſons and other crimes in the accuſation charged. Sir Nicholas Bramber, being the only one of them in cuſtody, was brought before the lords: he there waged his battle, which was refuſed him; and tho' the lords ſaid they would take due information by all ways to inform their conſciences of the matter of the accuſation, there ſeems to have been nothing ſtated by way of proof. It is indeed ſaid, that divers companies came from London to *aggravate* the charge; but this ſounds more like a popular clamour than an examination of legal evidence. However, upon this, the knight, not having an anſwer to make, was adjudged guilty, as were all the others.

As this proſecution was called an appeal, and under that name aſſumed the pretence of a legal proceeding, we are more ſtruck with any irregularity in it, and not leſs with the deciſive manner in which the lords over-ruled all attempts to reduce it to the order of the common law. The impeachment exhibited by the commons againſt the judges, being a proſecution *entirely* parliamentary, was more unqueſtionably, according to the opinion juſt given by the lords, out of the rules of the common-law, and to be judged of only by the law of parliament; a diſtinction which, we find, in thoſe days, made ſome difference as to the probability of the party being acquitted or convicted.

THE proceedings againſt the judges muſt therefore be explained by the parliamentary law of thoſe times. They were all, except *Skipwith* and *Treſlian (a)*, arreſted upon their ſeats in Weſtminſter-hall, on a charge of high-treaſon, in giving anſwers to queſtions propounded to them by the king; which queſtions tended to calumniate and remove the ſupreme authority which had been conferred on certain lords by commiſſion from the king,

(a) 1 Stat. Tri. 5.

confirmed

confirmed in parliament. They were all adjudged guilty of treaſon, and, tho' their lives were ſpared, they were obliged to ſubmit to baniſhment *(a)*.

THUS much of theſe famous proceedings againſt Richard's favourites and miniſters. During the ſame reign, there were other proſecutions of great men, which ſerve to illuſtrate the criminal proceedings in parliament in thoſe times.

THE appeal brought againſt Richard's old enemies, Glouceſter, Arundel, and Warwick, is related in this manner: In the great hall at Nottingham-caſtle, the king then ſitting with the crown on his head, ſeven lords appeared, who exhibited a bill of appeal of treaſon: this was read, and then, by the advice of the lords, and thoſe of the council about the king, the lords accuſed had a day given them to appear in the next parliament. The principal charge againſt theſe lords was, *the accroaching of royal power*, in the tranſaction which happened in the 10th of Richard II. and is to be found in all the hiſtories of thoſe times. Of theſe offenders, Glouceſter was murdered abroad, and the other two pleaded the king's pardon; which plea was overruled, as the pardons had been avoided by a late ſtatute; ſentence, therefore, was paſſed upon them, at the prayer of the appellants, without proving the charge: the ſentence was pronounced by the duke of Lancaſter, lord ſteward, by the command of the king, the lords temporal, and the *procurators* for the prelates and clergy; an appointment which was newly deviſed juſt about that time.

Appeal againſt the duke of Norfolk.

THE appeal between the dukes of Hereford and Norfolk is the moſt ſingular judicial proceeding (if it can be called one) within this period. In the 21ſt of Richard II. the day before the parliament ended, the duke of Hereford came before the king, and preſented him with a ſchedule, containing the ſubſtance of an accuſation he had before given the king ſome intimation of, againſt the duke of Norfolk: it related to ſome diſreſpectful words ſpoken by that nobleman againſt the king's perſon and government *(b)*. This being read before the king and lords, the next day (being the laſt of the parliament) it was ordained by the king, with the aſſent of the eſtates, that this matter ſhould be determined by the advice and diſcretion of the king, and the committee which had already been appointed by the parliament to repreſent the legiſlature, with all its authority, and to continue to diſpatch ſuch matters as were left unfiniſhed by parliament.

(*a*) 1 Stat. Tri. 14. (*b*) 3 Tyrr. 984.

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AFTERWARDS the king and the committee agreed, that the matter ſhould be determined by the law of chivalry, if other ſufficient evidence or proof could not be found for ending it by the ordinary courſe of law. Accordingly, as the one perſiſted in maintaining his aſſertion, and the other in denying the charge, and no proofs were brought, it was remitted by the above authority to be decided by ſingle combat at Coventry. There the two lords met, with all neceſſary formality, the king and the committee attending. Every thing was arranged by the conſtable and marſhal, and the combatants were ſpurring on to the attack, when the king put a ſtop to the engagement, ordered them to be diſarmed, and, retiring for two hours to his council to conſider of ſome expedient to prevent the effuſion of blood, the following ſentence was at length pronounced: "That the king, by the advice "of his council, to avoid the ſhedding of blood, had decreed, that, inſtead "of fighting, the defendant ſhould be baniſhed for life, and the appellant "for ten years *(a)*.

THIS unexpected ſentence, to get rid of a mode of proceeding not now much favoured, was as the judgment of the whole parliament; the committee, who repreſented the lords, being aſſiſting to the king at the trial. However, that this ſingular ſentence might not be queſtioned hereafter, it was ſolemnly ordained by the committee, that whoever attempted to reverſe any of thoſe acts of the king, ſo done with the aſſent of the committee, ſhould be conſidered as a traitor; and to make every thing ſure, an oath was exacted of every lord for the obſervance of them. From the foregoing relations may be formed an idea of the criminal law, when adminiſtered by the ſupreme judicature of the kingdom.

Origin of the court of equity in chancery.

THE court of chancery has hitherto been ſpoken of in no other light than as a common-law court; except when cauſes were referred thither, either by the parliament or council, and were there finally determined; which determination was not uſually made by the chancellor alone, but by a ſort of committee of the council, who would frequently adjourn thither for that purpoſe. It has been a received opinion, that the chancellor began, in this reign, to enlarge his judicial authority, by entertaining ſuits not cogniſable at common law; and thus gave riſe to the *court of equity*, which has ſince become the principal employment of the chancellor, ſo as to eclipſe the juriſdiction belonging to his antient court of common law.

(*a*) 3 Tyrr. 986 to 988.

WE

We have ſeen in the reign of Edward III. what ſteps the legiſlature had taken to preclude applications of ſuitors to the king in council. By theſe means, while queſtions of common law went to the courts of common law, equitable obligations, which made another branch of the juriſdiction of the council, were, in ſome degree, left only to the conſcience of men to fulfil, without a tribunal to give them effect. A ſtate of judicial polity like this, was extremely defective; and it became expedient, from conſiderations highly reſpecting the juſtice of the kingdom, that an authority ſhould reſide ſomewhere, to mitigate the rigour, and ſupply the inefficacy of proceedings at common law.

In the diſtribution of judicature, tribunals were eſtabliſhed for the adminiſtration of right, which were guided in their procedure and judgment by a ſettled form of things calculated for the ordinary courſe of redreſs, and conceived to meet the common inſtances of wrong and injury. To preſerve regularity and eaſe in buſineſs, ſuch forms were adhered to, and proceedings upon them became precedents for future caſes. But this ſyſtem, founded on the known cuſtom and written laws of the kingdom, was inadequate to the purpoſes of univerſal juſtice. There ſtill remained many injuries to property, which the common law did not relieve againſt, and many wrongs which an adherence to the letter of the law would only confirm and aggravate. To do complete and ſubſtantial juſtice, it was ſeen, that ſomething beſides law muſt be adminiſtered; ſomething that would ſupply its defects, and yet not contravene its rules; by which juſtice might be upheld without intrenching on the eſtabliſhed order of judicature.

Innumerable are the inſtances in which ſuch an authority was wanting. It will be ſufficient to conſider only the following: When a perſon was to found a claim by virtue of a deed which was detained in the hands of another, ſo that he was prevented from making a lawful exhibit of it, he was thereby utterly deprived of the means of obtaining juſtice according to the forms of law: If a deed of grant of rent, common, or annuity were loſt, as theſe claims could only be ſubſtantiated by the evidence of a deed, they were gone with it: If a perſon had neglected to take, or had loſt an acquittance for money paid; in an action of debt on a ſpecialty; the defendant in that caſe could not diſcharge himſelf on the plea of *nil debet*; becauſe it was a rule of law, that a deed could only be diſſolved by ſomeinſtrument of as high authority. All theſe caſes were rendered harder by another rule of law, that a party to a ſuit ſhould not be obliged to anſwer queſtions relating to the matter in diſpute; by means of which, that light

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which could be derived only from an examination of the perſons concerned, was quite ſhut out.

It was highly reaſonable, that ſome remedy ſhould be applied in theſe and the like defects of law, or the judicature of the kingdom would have been incomplete. The reſort in ſuch caſes had been to the king in council, in whom reſided every thing reſpecting law and juſtice that was not declared by any known rule, or not diſtributed among ſome of the judicial departments. But it will now be ſeen, that the conſideration of ſuch matters paſſed from that ſupreme tribunal to the chancellor.

This great officer, ſtanding in an immediate and confidential relation to the king's perſon and ſervice, was the principal of thoſe counſellors who aſſiſted by their advice in deliberating on ſuch matters as were brought before the council by petition. From an adviſer, it was natural, that, in length of time, his high rank and knowledge might conſtitute him almoſt the ſole judge; and filling already a department that made him the firſt ſpring in the adminiſtration of juſtice, as he framed original writs, by which alone juſtice was to be obtained; and being already in the exerciſe of a conſiderable judicial office, in determining on the expediency of the king's grants and patents; it was obvious, when this kind of petitions increaſed, to delegate the conſideration of them to the chancellor (of which there were numberleſs inſtances in the former reigns), who, in quality of a learned and pious eccleſiaſtic, might ſafely be truſted to for a conſcientious diſcharge of this important duty.

It was not unlikely, that the frequent reference to the chancellor, in theſe caſes, might lead to a ſhorter courſe of redreſs; and that the chancellor might be petitioned, in the firſt inſtance, to grant that relief, which, it was foreſeen, he would have to direct upon a reference for that purpoſe being made to him by the council, had they originally petitioned there. It is probable, that after the juriſdiction of the council was reſtricted by the ſtatutes made in the laſt reign, it became the practice, if it had not been ſo before, to addreſs petitions and bills of complaint to the chancellor himſelf.

Even the ordinary common-law buſineſs of the chancellor carried in it ſome appearance of a court of equity. The holding of pleas concerning the king's grants, and determining on their validity from conſiderations of policy and fitneſs; the exerciſing a kind of guardianſhip over the eſtates and perſons of ſuch of the king's ſubjects who were not able to protect themſelves, as ideots and lunatics; this was a ſcope of judicature not like that of any other court of common law. Leſs clamour was likely to be raiſed by

by thoſe who were jealous for the common law, when they obſerved the equitable judicature of the council exerciſed by a judge like this, who was already of high rank and authority in an ancient judicial department, and whoſe juriſdiction was already of a nature ſomewhat ſimilar.

THERE was another part of the chancellor's office, which afforded an opening to an innovation like this. The permiſſion given to the chancellor by ſtat. Weſtm. 2d, to frame writs *in conſimili caſu* had enlarged to ſo great an extent his remedial authority, that every thing like relief ſeemed within his juriſdiction. When he had gone as far as the analogy of the common law would allow in forming writs of a liberal conception, he might think it inconſiſtent with his office to diſmiſs any one from the chancery without relief of ſome kind; and he might venture, in his own court, to entertain and decide ſuch matters of an equitable nature, as he foreſaw it would be in vain to ſend to the courts of common law. Whatever were the grounds the chancellor reſted his juriſdiction upon, it is evident, that he had begun, about this time, to exerciſe certain judicial powers of a new and equitable kind unknown to the antient courts of the realm. The fixing the chancery at Weſtminſter, as was done about the 4th of Edward III. might contribute to eſtabliſh the chancellor in theſe new powers, as he became by his reſidence there more acceſſible at all ſeaſons.

IT is ſaid, that John Waltham (*a*) biſhop of Saliſbury, who was keeper of the rolls about the 5th of Richard II. conſiderably enlarged this new juriſdiction; and, to give efficacy to it, invented, or, more properly, was the firſt who adopted in that court the writ of *ſubpœna*; a proceſs which had before been uſed by the council, and is ſometimes alluded to in the ſtatutes of the laſt reign, though not under that name (*b*). This writ ſummoned the party to appear under a penalty, and anſwer ſuch things as ſhould be objected againſt him; upon this a petition was lodged, containing the articles of complaint to which he was then compelled to anſwer. Theſe articles uſed to contain ſuggeſtions of injuries ſuffered, for which no remedy was to be had in the courts of common law, and therefore the complainant prayed advice and relief of the chancellor.

Writ of ſubpœna.

SOME have attributed the origin of this court of equity to *Cardinal Beaufort*, the ſon of John of Gaunt, who was biſhop of Wincheſter in the reign of Henry V. It is an opinion alſo (*c*), that the chancellor aſſumed this ex-

(*a*) So it appears from Rot. Parl. 3 Hen. V. (*b*) Vid. ant. 90. (*c*) Gilb. For. Rom. 17.

traordinary

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traordinary judicature in order to be in a ſituation to favour ſome pretenſions of the churchmen. Uſes, contrived firſt by the clergy, it is ſaid, with a view to enrich them in defiance of the ſtatute of mortmain, were of a new impreſſion, and intirely out of the rules of the common law. A perſon *ſeiſed* of a uſe had no means of obtaining the execution of it, but the conſcience and honour of the feoffee. To give effect to theſe diſpoſitions, the chancellor, who was himſelf an eccleſiaſtic, applied, it is ſaid, this new writ of *ſubpœna*, to compel a feoffee to anſwer before him reſpecting ſuch truſt; and, upon the truth of the matter appearing, he would decree ſuch execution of the uſe as the feoffee was bound in conſcience to make. This is given as the occaſion on which the court of chancery firſt exerciſed its *equitable* juriſdiction.

AFTER what has been before obſerved, it will not be eaſily credited that this was the origin of the court of equity. Yet it is not at all improbable that ſuch conſiderations might have been motives with clerical chancellors to entertain ſuits of that kind with great readineſs; and the frequency of them might have brought the court into ſuch a ſudden repute, as would have very much the appearance of an intire new creation. The conſequence was, that later times have dated the birth of this equitable juriſdiction from the period when it grew into more notice by the acceſſion of a new ſubject of litigation.

THE chancellor was not ſuffered to continue increaſing this new authority unnoticed or unmoleſted. He was watched by the legiſlature, and ſuch checks were occaſionally applied, as were thought neceſſary to keep it within juſt bounds. In the 13th Richard II. *(a)* the commons petitioned the king, that the chancellor might make no order againſt the common law; and that no judgment ſhould be given without due proceſs of law. In another petition they prayed, that no one ſhould appear before the chancellor, where recovery was given by the common law: to both which the king's anſwers are to the like effect, that it ſhould continue as the uſage had been heretofore. Theſe applications to the king carry in them an admiſſion, that ſuch a power of judicature did reſide in the chancellor, ſo long as he did not determine againſt the common law, nor interpoſe where it furniſhed a remedy; and the anſwer as clearly demonſtrates, that ſuch an authority reſiding ſomewhere, was recogniſed by the uſage and conſtitution of the realm.

(a) Rot. Parl. 13 Ric. II.

BUT

But the ſtat. 17 Ric. II. c. 6. (before mentioned) recogniſes this new judicature in the moſt explicit terms, and, by coupling it with the council, ſeems to intimate its origin to have been as we have juſt ſuppoſed. This ſtatute recites, that people are compelled to come before the king's council, or in the chancery, by writs grounded on untrue ſuggeſtions; and, on that account, enacts, that the chancellor, preſently after ſuch ſuggeſtions were duly proved untrue, ſhould have power to award damages, according to his diſcretion, to the perſon ſo grieved. This ſtatute ſeems to give the firſt teſtimony to the eſtabliſhed authority of this court, and may be conſidered as a legiſlative ſanction to its eſtabliſhment; for after this it enlarged its judicature with great freedom.

Court of the conſtable and marſhal.

Besides the court of equity in chancery, two other new juriſdictions had lately grown into notice; that of the *conſtable* and *marſhal*, and that of the *admiral*. Of theſe, there is very little notice before this king's reign. The former is mentioned in a report-book of the laſt reign, as a court (*a*) which was to decide upon contracts made upon martial affairs. We hear no more of this court till the 2d of Richard II. when the commons petitioned that the conſtable and marſhal might ſurceaſe from holding plea of treaſon or felony, which ſhould be determined only before the king's juſtices. It ſeems, the heirs to theſe two offices being then within age, they and the offices were in the cuſtody of the king; and for this reaſon the parliament refrained from making any alteration in this new tribunal (*b*). The objection to this court was, that it was governed by *the law of arms*, and not by the general cuſtom of the kingdom; and at a ſecond meeting of this ſame parliament, it was ſtated by the biſhop of St. David's, who happened to make the uſual ſpeech at the opening of the parliament, as a grievance, that the law of arms and the law of the land did not concur (*c*). To quiet the minds of the people upon this ſubject, at length a ſtatute was made; but this was ſo general, that it left things in the ſame ſtate they were in before. It was declared, by ſtat. 8 Ric. II. c. 5. that whereas divers pleas concerning the common law, and which ought to be examined and diſcuſſed by that law, were now of late (*d*) drawn before the conſtable and marſhal of England, to the great damage and diſquiet of the people; it was therefore declared and ordained, that ſuch pleas and ſuits ſhould not be brought in that court, but this matter ſhould ſtand as it did in the time of Edward

(*a*) Vid. ant. (*b*) Cott. Abri. p. 171. § 47. (*c*) Ibid. p. 173. § 8. (*d*) *Jam de novo.*

the

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the Third. This ſeems to be calculated for ſatisfying the preſent diſcontent of the people, without diſturbing things, till the office was out of the wardſhip of the king; but in the 13th year of the king (when probably that event had taken place) an act of a more ſpecial nature was made, which ſeems to define the authority of that court very exactly. Conſidering the daily encroachments made by the court of the conſtable and marſhal, in holding plea of contracts, covenants, treſpaſſes, debts, detinues, and other matters cogniſable at common law, it was intended, by ſtat. 13 Ric. II. c. 2. to make a declaration of the juriſdiction of the ſaid conſtable (for the act does not in this place name the marſhal) in the following way: "To "the conſtable," ſays the act, "belongs the cogniſance of contracts touch-"ing deeds of arms, and of war out of the realm, and alſo of things which "touch war within the realm, which cannot be determined nor diſcuſſed "by the common law, with other uſages and cuſtoms to the ſame matters "appertaining, which other conſtables before that time had duly and rea-"ſonably uſed." It was alſo ordained, that every plaintiff ſhould declare plainly his matter in his petition, before any one ſhould be ſent to anſwer thereto; and if any would complain that a plea was commenced before the conſtable and marſhal which might be tried by the common law, he might have a privy ſeal of the king without difficulty, directed to the conſtable and marſhal, to ſurceaſe in the plea, till it was diſcuſſed before the king's council, whether the matter belonged to the common law, or to that court.

The marſhal, who was joined with the conſtable in the preſidency of this court, was a perſon who filled a different office from him who was aſſociated with the ſteward, though it was common for them both to be held by the ſame perſon, as well as other offices which likewiſe conferred the title of marſhal. This appears from a tranſaction in the 20th year of this reign; for the king granted to the earl of Nottingham, and to the heirs male of his body, the office, name, and title of earl marſhal of England, the office of marſhal in the king's bench and exchequer, the office of proclaimer marſhal, and of the ſteward and marſhal of the king's houſhold *(a)*.

While the crown were in poſſeſſion of territories on the continent, as during the latter part of Edward III. and the reigns of Richard II. and the two Henry's, there muſt have been employment for this court, notwith-

(a) Cott. Abri. p. 363. § 32.

ſtanding

ſtanding the fiction that had been deviſed in the time of Edward III. to make matters ariſing beyond ſea cogniſable by a jury from an Engliſh county. We ſhall alſo find there was conferred on them a criminal juriſdiction, by which they tried crimes committed beyond ſea; and this they exerciſed ſo low down as the reign of queen Elizabeth *(a)*, though it was in part rendered leſs neceſſary by the ſtatute of Henry VIII. for trying treaſon committed beyond ſea.

Of the admiral.

THE office of admiral is conſidered by the French as a piece of ſtate invented by them; nor does it appear that any officer of this kind was conſtituted in England till about the time of Edward I. and from thence the place of high admiral had been conferred on ſome of the firſt nobility. We have yet met with nothing concerning the judicial authority of this officer; but in this reign there had ariſen a like jealouſy of his authority, as of that of the conſtable and marſhal. It was the port-towns, which had franchiſes of their own, that raiſed moſt of the complaints againſt the admiral *(b)*. To ſatisfy them, an act was at laſt made, in the 13th year of the king. The preamble of this act (*c*) ſtates the complaints as ariſing, becauſe admirals and their deputies held their ſeſſions within divers places of the realm, as well within franchiſes as without, *accroaching* to them greater authority than belonged to their office, to the prejudice of the king, and of perſons poſſeſſed of franchiſes: to remedy which, it was declared, that the admiral or his deputies ſhould not meddle with any thing done within the realm, but only of things done upon the ſea, as had been uſed in the time of Edward III.

THIS, like the firſt act about the juriſdiction of the conſtable and marſhal, was too general to have any effect in working a reformation. It was therefore ſoon followed by ſtat. 15 Ric. II. c. 3. where their juriſdiction was more particularly marked out. Firſt, it was declared, that of all manner of contracts, pleas, and quarrels, and all other things ariſing within the bodies of counties, as well by land as by water, and alſo of wreck of the ſea, the admiral's court ſhould have no manner of cogniſance or power; but they were to be determined by the common law. Nevertheleſs, the admiral was to have cogniſance of the death of a man, and of a mayhem done in great ſhips, being and hovering in the main ſtream of great rivers, only beneath the *bridges* (*d*) of the ſame rivers near the ſea, and in

(*a*) Vid. poſt. (*b*) Cott. Abri. p. 339. § 33. (*c*) Ch. 5. (*d*) *Paraval les pountz*; in the old Abridgment it is *portes*; in Pickering it is *bridges*; in the *Nova Statuta* it is *pointz*.

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none other places of the ſame rivers. It was further ordained, that he ſhould have power to arreſt ſhips in the great fleets for the great voyages of the king, and of the realm, ſaving to the king all manner of forfeitures and profits thence ariſing: he was alſo to have juriſdiction on ſuch fleets during ſuch voyages, ſaving alſo to lords, cities, and boroughs, their liberties and franchiſes.

It may be aſked, By what law was the court of the conſtable and marſhal, and that of the admiral, governed? It has been ſaid by later writers, that the proceeding in the former was in a courſe directed by the civil law (*a*); but *the law of arms* was ſurely not to be found in the volumes of imperial juriſprudence. The laws of *Oleron*, as they were called, might conſtitute a national code of maritime law, for the direction of the admiral; and whatever was defective therein was ſupplied from that great fountain of juriſprudence, the civil law, which was generally adopted to fill up the chaſms that appeared in any of the municipal cuſtoms of modern European nations.

It ſhould ſeem, that the old laws reſpecting the bounds of the ſteward and marſhal's court were not obſerved; for in the beginning of this reign, the commons petitioned, that the juriſdiction of the marſhal might be limited, and that all perſons within the verge might have their liberties (*b*): and it was enacted by ſtat. 13 Ric. II. c. 3. that the juriſdiction of the court of the ſteward and marſhal of the king's houſe ſhould not paſs the ſpace of twelve miles, to be reckoned from the king's lodging, which was conformable with ſome petitions in the former reign (*c*). After this ſtatute, there were no further parliamentary declarations on the ſubject of this court, except a ſhort act in the reign of Henry VI.

Having ſaid thus much upon theſe courts of a particular and ſpecial nature, we come now to the ordinary courts of law, reſpecting which ſome regulations were made by parliament well deſerving of notice. Great complaint was made of the dilatory and oppreſſive courſe of the court of exchequer; where, in addition to the rigour which was experienced from the natural order of things, the clerks practiſed many unfair devices upon the accountants. Among other hardſhips, the heirs and executors of perſons who had accounted at the exchequer, would not be allowed to plead the diſcharge of their anceſtor or teſtator, without a writ or privy ſeal authorizing them ſo to

Court of exchequer.

(*a*) Duck de Auth. Jur. Civil. 336. 340. (*b*) Cott. Abri. p. 160. § 65. (*c*) Vid. ant. 91.

do.

do. By this act, the neceſſity of ſuch writs was removed; all perſons were admitted to plead as in other courts; heavy penalties and impriſonment were inflicted on clerks who iſſued proceſs to recover debts already paid; and the buſineſs of the exchequer, as far as concerned the king's revenue, was better regulated by ſeveral acts of parliament (*a*). It ſeems, as the court of exchequer was not within the act of *niſi prius*, whenever an iſſue in a foreign county was to be tried, a ſpecial commiſſion uſed to be made out: it was now enacted, that no more than two ſhillings ſhould be given for ſuch commiſſion, as the clerk's fee for making it out; and the ſame for the record of *niſi prius*, with the writ (*b*). The people were not ſatisfied with the courſe of appeal eſtabliſhed from this court, by the ſtatute of the laſt reign (*c*); but it was again prayed (though without effect) by the commons, that errors in the exchequer might be redreſſed in the king's bench or parliament (*d*).

The ſubſtance of the oath which had been ordained by ſtat. 18 Ed. III. ſt. 4. to be taken by the judges and barons, was put into a ſtatute in the 8th year of this king (*e*). This act ordains, that they ſhould not take any robe, fee, penſion, gift, or reward of any but of the king, except reward of meat or drink, which ſhould be of no great value: they were to give no counſel to any in matters where the king was party, or where the king was any ways concerned; nor were they to be counſel with any man in any cauſe or matter depending before them, upon pain of loſing their office, and making fine to the king. It was part of the charges againſt the archbiſhop of York, *Robert de Vere*, and *Michael de la Pole*, that they on many occaſions tampered with the judges; and thoſe ſuſpicions might have produced the above act. But, whatever was the motive for making it, we find it was repealed the next year by ſtat. 9 Ric. II. c. 1. *becauſe* IT WAS VERY HARD, *and needed declaration.* It was by another chapter (*f*) of the former ſtatute enacted, that if any judge or clerk was convicted before the king and council of falſe entering of pleas, raſing of rolls, and changing of verdicts, to the diſheriſon of either of the parties to the ſuit, they ſhould be puniſhed at the diſcretion of the council.

It was to prevent the poſſibility of undue influence, that it was ordained by the ſame act (*g*), that no *man of law* ſhould be juſtice of aſſiſe, or of the

(*a*) Stat. 1 Ric. II. c. 5. ſtat. 5 Ric. II. c. 9. 11, 12, 13, 14, 15. (*b*) Stat. 5 Ric. II. c. 16. (*c*) Vid. ant. 92. (*d*) Cott. Abri. p. 164. § 105. (*e*) Ch. 3. (*f*) Ch. 4. (*g*) Ch. 2.

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common deliverance of gaols, in his own country. This prohibition was confined to ſuch perſons in the commiſſion as were men of the law, becauſe the perſons aſſociated with them were, by ſome former ſtatutes, expreſly required to be perſons of the county. Some further regulations were made concerning theſe provincial judicatures. By the laſt mentioned act it was ordained, that the chief juſtice of the common bench ſhould be aſſigned among others to take aſſiſes and deliver gaols; but that, as to the chief juſtice of the king's bench, it ſhould be as had been for the moſt part the laſt hundred years. What the practice had been for the preceding hundred years does not appear by any ſtatute, report, or book; but it ſhould at leaſt ſeem from this act, that the chief juſtice of the common bench did not uſe to go circuits. By ſtat. 20 Ric. II. c. 3. it was enacted, that no lord, nor other of the country, little or great, ſhould ſit upon the bench with the juſtices to take aſſiſes in their ſeſſions, upon pain of great forfeiture to the king; and the ſtatute ſays, the king had charged the juſtices not to ſuffer this order to be broken. This, like ſome of the former laws, muſt have been occaſioned by late diſcoveries of the interference and ſway of great men in judicial matters. It was ordained by ſtat. 6 Ric. II. ſt. 1. c. 5. that juſtices of aſſiſe and gaol-delivery ſhould hold their ſeſſions in the principal and chief towns of every county where the ſhire-courts were held; but in ſtat. 11 Ric. II. c. 11. this was ſaid to be found in part prejudicial and grievous to the people in many counties; and, on that account, the chancellor was thereby empowered to remedy it by the advice of the juſtices, when occaſion required.

COMPLAINT was made, that perſons were impannelled on juries, and after that, the parties would not ſue their writ of *niſi prius*, but delayed it from year to year; by which it was ſaid (though it does not appear how), jurors ſuffered great loſs, ſometimes to more than the yearly value of their land. To remedy this, it was enacted by ſtat. 7 Ric. II. c. 7. that in all pleas where a *niſi prius* might be had of courſe, after the grand diſtreſs thrice returned, and ſerved before the juſtices againſt the jurors, and thereupon the parties demanded, if none of ſuch parties would ſue the writ of *niſi prius*, then it might be made at the ſuit of any of the jurors preſent; and this might be in the exchequer as well as the other courts.

VERY little was done towards adding to or improving the remedies formerly in uſe. By ſtat. 7 Ric. II. c. 10. it was ordained, that an aſſiſe of novel diſſeiſin for rent due out of tenements in divers counties ſhould be had *in*

conſinio

Statutes of forcible entries.

confinio comitatûs within which the tenements lay, in the ſame manner as had before been uſed where a common of paſture in one county was appendant to land in another. The ſtatutes upon *forcible entries* had a more extenſive effect, as they abrogated the old method of redreſs in caſes of diſſeiſin. We have ſeen, that in the time of Bracton *(a)* a perſon diſſeiſed might recover ſeiſin by force, with a multitude of friends to aſſiſt him, provided he made this attempt *flagrante diſſeiſinâ*; and ſo the law continued to the period of which we are now writing. But the ſtate of things was now ſo altered, and the ideas of men ſo different, that theſe forcible vindications of a man's property were thought incompatible with a well-ordered government. It was accordingly enacted, by ſtat. 5 Ric. II. c. 7. that none ſhould enter lands and tenements, but where an entry was given by the law; and in ſuch caſe, not with ſtrong hand, nor with multitude of people, but only in a peaceable and eaſy manner; and if any one did the contrary, and was thereof convicted, he was to be impriſoned and ranſomed at the king's pleaſure. Thus a diſſeiſee, if he entered with force, became puniſhable in the ſame manner as a diſſeiſor with force had been before. A more ſummary method was pointed out by ſtat. 15 Ric. II. c. 2. which directs, that upon complaint made to any juſtice of peace of ſuch forcible entry, ſuch juſtice or juſtices ſhould take ſufficient power of the county, and go to the place where the force was; and if they found any perſons holding the place forcibly after ſuch entry made, they were to be taken and committed to the next gaol, and there remain convict by the record of the juſtices, or juſtice, until they had made fine and ranſom to the king. The ſheriff and all the people of the county were thereby required to attend the juſtices. The ſame of forcible entries into benefices, or offices of holy church.

In order that thoſe in reverſion might not be loſers by the colluſion of the particular tenants, the following ſtatute was made. It was enacted by ſtat. 9 Ric. II. c. 3. that if tenant for term of life, tenant in dower, tenant by the courteſy, or tenant in tail after poſſibility of iſſue extinct, was impleaded, and pleaded to an inqueſt, and loſt by verdict, or by default, or in any other manner, he to whom the reverſion of ſuch tenements belonged, his heirs and ſucceſſors, ſhould have an action by writ of attaint, or by writ of error, as well in the life of ſuch tenants, as after their deaths; and if he ſucceeded in ſuch writ, the tenant who loſt ſhould be reſtored to his poſſeſſion, with the

(*a*) Part I. 236.

iſſues

iſſues in the mean time, and the party ſuing to the arrears of the rent, if any were due; and if the tenant were dead, then to the land in queſtion. Moreover, altho' the particular tenant was alive, yet if the reverſioner ſo ſuing alledged that he was of covin and conſent with the demandant who recovered againſt him, the tenements were to be reſtored to the reverſioner. The tenant, however, might afterwards have a *ſcire facias* out of the judgment ſo reverſed, if he would traverſe the covin alledged. This was a redreſs ſimilar to that which had been allowed to termors for years, by a ſtatute of Edward I. *(a)*. Another way in which the particular tenant could injure the reverſioner, was by making *default*, if impleaded for the freehold: in ſuch caſe the reverſioner was entitled by a ſtatute of Edward I. (*b*) to be received to defend the right; but there was no remedy where he *pleaded in chief* ſuch pleas by which he knew the inheritance muſt be loſt. To remedy this, it was now enacted, by ſtat. 13 Ric. II. ſt. 1. c. 17. that where any of the before-mentioned tenants were impleaded, and he in reverſion came into court and prayed to be received to defend his right, at the day the tenant pleaded to the action, or before; he ſhould be received to plead in chief to the action, without making any delay by voucher, aid-prayer, nonage, or other delay, by eſſoin or protection.

THE laying the venue in actions, which had been almoſt optional, was ſomewhat reſtrained by ſtat. 6 Ric. II. ſt. 1. c. 2. which provides, that in actions of debt, accompt, and *all other ſuch actions*, if the declaration ſtated the contract to be in any other county than that contained in the original writ, the writ ſhould be immediately abated. It was ordained, by ch. 3. of the ſame ſtatute, that the writs of nuiſance, commonly called *vicontiel* (*c*), might be brought, either in the old way, or elſe in the nature of aſſiſes determinable before the juſtices of the one bench or the other, or of aſſiſe to be taken in the country; ſo that the diſtinction between theſe writs, ſo much attended to in the laſt reign, began to be of leſs moment. It ſhould ſeem, from ſimilar caſes in the laſt reign, that the queſtion whether a priory was donative or not, ſhould be tried *per pais* (*d*). But it was now ordained, by ſtat. 9 Ric. II. c. 4. that ſuch an iſſue ſhould be tried by the certificate of the ordinary of the place; and this was to be, as well where the party was not ordinary, as where he was. Notwithſtanding the precaution taken by the legiſlature in making ſtat. 25 Ed. III. ſt. 3. c. 3.; yet the king's preſentees, either by the favour of ordinaries, the partiality of inqueſts, or perhaps by the parties not being duly warned, would get themſelves forced into benefices, and the incumbents put out. To remedy this,

(*a*) Part I. 401. (*b*) Part I. 427. 451. (*c*) Vid. ant. 146. (*d*) Vid. ant. 188.

it

it was now provided, in addition to the courſe there directed, that where a benefice was full of an incumbent, the king's preſentee ſhould not be received till the king had recovered by proceſs of law; and if any was received otherwiſe, and the incumbent put out, he was to commence his ſuit within a year after the induction of the king's preſentee.

It was held in the time of Edward III. that a priſoner in cuſtody upon a judgment, ſhould not be ſuffered to go at large without the conſent of the plaintiff; but it was now complained, that ſuch perſons were frequently let at large by the warden of the Fleet-priſon, ſometimes by mainpriſe or by bail, and ſometimes without any mainpriſe, with a *baſton* of the *Fleet*, and went into the country about their private affairs, continuing out many nights and days without the conſent of, or any ſatisfaction made to, their plaintiffs. To prevent this, it was enacted by ſtat. 1 Ric. II. c. 12. that no warden of the *Fleet*, upon pain of loſing his office, ſhould ſuffer a priſoner by judgment to go out in any of the above ways, without making gree to the parties at whoſe ſuit he was there, unleſs it was by writ, or other commandment of the king; and if he was attainted of ſuch neglect by due proceſs, the plaintiff might have recovery againſt him by writ of debt. It was uſual, when an action was commenced in another court againſt a priſoner, for him to be removed into the priſon of that court: this had been abuſed in a way that cauſed the following proviſion, declaring, that if any priſoner in execution in another priſon would confeſs himſelf voluntarily, and by a feigned cauſe, debtor to the king, and by that means to be judged to the *Fleet*, there to have *greater ſweet of priſon* than elſewhere, and ſo delayed the party of his recovery, ſuch recogniſance ſhould be taken as a true one; ſo that the party being remanded to his firſt priſon till he had ſatisfied his firſt plaintiff, ſhould then be brought back to the *Fleet*, and there detained till he had ſatisfied the recogniſance.

Two laws were made for the reſtraint of *protections*; a ſpecies of privilege which created great obſtacles to the courſe of juſtice. We have ſeen *(a)*, that ſome protections had the clauſe of *volumus*, and ſome that of *nolumus*: we now find, that ſome were diſtinguiſhed by having the clauſe of *quia profecturus*, ſimply alledging that the party was going abroad; others were *quia moraturus*, ſignifying that he was to reſide abroad. By ſtat. 1 Ric. II. c. 8. it was enacted, that no protection with a clauſe of *volumus* ſhould be allowed before

(a) Vid. ant. 198.

any

any judge, for victuals taken or bought upon the voyage or ſervice of which the protection made mention, nor in pleas of treſpaſs, or of other contracts, ſince the date of the protection. It was no uncommon thing to purchaſe theſe protections, both with a clauſe of *volumus* and of *quià profecturus*, after a plea was actually commenced againſt them, merely to delay the proceedings, without any regard to the king's ſervice, in which the parties pretended to be employed, for they in the mean time continued to ſtay at home. This abuſe of protections occaſioned the following act, 13 Ric. II. ſt. 1. c. 16. ordaining, that no protection with clauſe of *profecturus* be allowed in any plea commenced before the date of the protection, if it was not in a voyage where the king went in perſon, or in ſome voyage royal, or on the king's meſſages for buſineſs of the realm; but ſuch perſons were to make their attornies to anſwer for them, or ſtay themſelves. But notwithſtanding this reſtraint on the above protections, the protection *quià moraturus* was to be allowed in all caſes, as before. It was likewiſe provided, that if any perſon remained in the country, without going on the ſervice for which he was retained, the chancellor might repeal the protection.

Of treaſons.

THE commotions which happened in this reign, and the viciſſitudes experienced by the ſeveral contending parties, had an effect upon our criminal law. When that could be made an inſtrument in the hand of either to deſtroy their opponents, they never failed of availing themſelves of it; and at every occaſion they endeavoured to give a new edge to the ſword of juſtice. In no period of our hiſtory was the crime of treaſon imputed ſo promiſcuouſly to all ſorts of reſiſtance and oppoſition. This extravagance was not confined to the lords in parliament, who might be hurried into violent meaſures by the heat of party and the fluſh of ſucceſs; but we ſhall find the ſages of the law giving deliberate opinions of the ſame import, upon queſtions ſtated in writing: ſo that the ſubject ſeemed to derive little benefit from the ſtatute of treaſons.

THE firſt alteration made in the law of treaſon, was by act of parliament. It was enacted by ſtat. 5 Ric. II. ſt. 1. c. 6. that if any made or begun any manner of riot and *rumour, or the like*, and the ſame was duly proved, it ſhould be done of him as of a traitor to the king and realm. A declaration of treaſon like this, might perhaps be excuſed by the late riots, which had been carried to a length ſufficient to endanger the ſafety of the government. Two years before that ſtatute, it happened that one *John Imperial*, an ambaſſador from the ſtate of *Genoa*, was killed in London: this had

had been adjudged treaſon by the judges, and that ſentence was confirmed by parliament; the reaſon alledged being, that it affected the king's majeſty *(a)*. In the 17th year of the king, we find the duke of *Lancaſter*, ſteward of England, and the duke of *Glouceſter*, conſtable of England, complained in parliament, that Sir *Thomas Talbot* with other adherents conſpired the deaths of the ſaid dukes. This was adjudged by the king and lords in parliament to be open and high treaſon *(b)*. The parliament made the above declarations by virtue of that power which was acknowledged to reſide in it, by the ſtatute of treaſons; and which it could not be denied to poſſeſs, as neceſſarily belonging to its legiſlative authority.

THE famous opinions given by the judges had not that ſanction, and therefore ſhould have been founded on principles of known and eſtabliſhed law. The following was the occaſion on which theſe opinions were taken: The king being compelled to ſign a commiſſion and call a parliament, at the inſtance of a great part of his nobles, wiſhed to get rid of the act he had done under ſuch compulſion; and, thinking the law on his ſide, cauſed certain of his judges and others to be conſulted on different queſtions, calculated to ſtigmatize and declare void the late proceedings. In the 11th year of this reign, in the preſence of the king and ſome lords at Nottingham-caſtle, were ſummoned *Treſilian*, the chief-juſtice of the king's-bench, and *Belknap*, chief-juſtice of the common-bench; *Holt*, *Fulthorpe*, and *Burghe*, judges of the common-bench; and *Lokton*, one of the king's ſerjeants at law To theſe perſons were the following among other queſtions propounded, which received the annexed anſwers. Being aſked, How thoſe ought to be puniſhed who procured the above-mentioned ſtatute, ordinance, and commiſſion? they anſwered, By capital pain; as ought thoſe likewiſe *who excited the king to conſent* to the ſaid ſtatute. Thoſe who *compelled* the king to conſent, they ſaid, ſhould be puniſhed as *traitors*; as ſhould thoſe alſo who interrupted the king in the exerciſe of thoſe things that belonged to his royalty and prerogative. The following queſtion, namely, Whether, if the king *limited* to the lords and commons certain articles to be debated, and they proceeded upon others, and would not go upon the king's articles till he had anſwered theirs, the king ſhould be obeyed? they anſwered, That ſuch as diſobeyed this rule of the king, ſhould be puniſhed as *traitors*. If the king diſſolved the parliament, and any proceeded therein afterwards, they ſaid, he was to be conſidered as a traitor. They ſaid, it would be treaſon to impeach in

(*a*) 3 Ric. II. Cott. Abri. p. 183. § 18. (*b*) Cott. Abri. p. 353. § 20.

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parliament any of the king's officers, or juſtices; and that the perſon who moved that the ſtatute whereby Edward II. was indicted ſhould be ſent for, and he who, by force of ſuch motion, brought it into the parliament, were guilty of *treaſon*.

THE judges who concurred in theſe opinions, were afterwards proſecuted as offenders; but things taking another turn, in the 21ſt year of the king, theſe opinions were read in full parliament, and there received the ſanction of the legiſlature; and at the ſame time they were pronounced by Sir *Thomas Skelton*, and *Hankford*, and *Brenchley*, the king's ſerjeants, to be *good and lawful*. But it is recorded in the ſame ſtatute of 21 Ric. II. that *Thirning*, and *Clopton*, ſucceſſively chief-juſtices of the common-bench, and *Richel'ill* a judge in that court, gave a more diſcreet opinion upon the act of theſe judges: they ſaid, that the declaration of treaſon not declared, belonged to the parliament; and *if the offender were a lord*, or peer of parliament, and thoſe queſtions had been put to *him*, *he* would have given the like anſwers: which was intimating that they were not found conſonant to the law, as eſtabliſhed and known, but were fit enough to be declared treaſon by parliament.

IN the ſame ſtat. 21 Ric. II. c. 3. ſome points of treaſon which had been ſettled by the ſtatute of treaſons, were re-enacted, together with ſome others that were not within that act. Thus, it was ordained, that every one who compaſſed or purpoſed the death of the king, or to depoſe him, or to render up his homage or liege; or he that raiſed people, and rode againſt the king to make war within the realm, and was judged and attainted thereof *in parliament*, ſhould be conſidered as guilty of high treaſon; and ſhould forfeit his lands, as well thoſe in fee-tail as thoſe in fee-ſimple. The difference between this act and the ſtatute of treaſon is, that this did not require an overt act to be proved; but then it was to be judged of only in parliament; and lands in fee-tail were forfeit thereby. It was made treaſon to procure, or counſel to repeal or annul, any judgments given againſt ſtatutes made in the parliament 11th Rich. II. which the king now procured to be declared void *(a)*; and it was alſo declared treaſon for any one to attempt to repeal the ſtat. 21 Ric. II. *(b)*

BESIDES the above proviſion about riots, other ſtatutes were made for the ſuppreſſion of theſe diſorders, which had lately grown to a height that threat-

(a) Ch. 4. (b) Ch. 20.

ened

ened the exiſtence of government. In ſtat. 2 Ric. II. ſt. 1. c. 6. there is a lively picture drawn of the riots which then very commonly happened. People uſed to come in great bodies, ſometimes under pretence of taking poſſeſſion of lands to which ſome would ſay they had a right: they would pillage a whole neighbourhood, carry off women and children, and commit all ſuch acts of violence as might be expected from an invading enemy. To maintain the peace againſt ſuch extraordinary attacks, required more than the ordinary means. Among other methods it was ordained, that the ſtatute of Northampton ſhould be kept in all points; and moreover, that certain ſufficient *and valiant perſons*, lords, or others, ſhould be aſſigned by the king's commiſſion, with authority to take ſuch rioters, without waiting for an indictment, and commit them to cuſtody till the coming of the juſtices. But this new authority was repealed by ſtat. 2 Ric. II. ſt. 2. c. 2. the ſtatute of Northampton being thought quite adequate to the purpoſe. This repeal was procured by ſome great lords, who were too much intereſted in the outrages committed by theſe people (many of whom were their retainers, and partiſans), to ſuffer any greater reſtraint to be put on their meetings. When the *villains*, about a year or two after this, had riſen in different parts of the country, and compelled manumiſſions and privileges to be granted them, it was enacted, as we have ſeen, by ſtat. 5 Ric. II. ſt. 1. c. 6. that rioters ſhould be puniſhed as traitors. The diſcontents of the villains continued all through this reign. Upon the occaſion of new diſturbances made by this order of people, particularly in *Cheſhire* and *Lancaſhire*, it was enacted by ſtat. 17 Ric. II. c. 8. that ſheriffs, and other the king's miniſters, ſhould take ſuch offenders; and all lords, and others of the realm, ſhould be aſſiſting therein. We ſhall ſee what courſe was purſued in the next reigns, for the ſuppreſſion and puniſhment of ſuch diſorderly perſons.

Scandalum magnatum.

THE two ſtatutes againſt *the ſpreaders of falſe rumours* are ſaid to have been procured by the duke of Lancaſter, who was extremely unpopular, and, at the time of the inſurrections among the villains, had been ſingled out as a principal object of their fury. The firſt of theſe is ſtat. 2 Ric. II. ſt. 1. c. 5. The deſign of this act will be beſt underſtood from the preamble. "Of the "deviſors (ſays the act) of falſe news, and of horrible and falſe lies of pre-"lates, dukes, earls, barons, and other nobles and great men of the realm; "and alſo of the chancellor, treaſurer, clerk of the privy ſeal, ſteward of the "king's houſe, juſtices of the one bench or of the other, and of other great "officers of the realm, of things which by the ſaid perſons were never ſpoken,

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"done, or thought; in great ſlander of them, and whereby debates and diſ-"cords might ariſe betwixt them, or between them and the commons, and "great miſchief to the realm:" theſe were the objects meant to be aimed at by this ſtatute; and it was enacted, that none, under grievous pain, be ſo hardy as to deviſe, ſpeak, or tell any falſe news, lies, or other ſuch falſe things, of the above-mentioned perſons, whereof diſcord or ſlander might ariſe within the realm; and thoſe who offended therein were to be liable to the ſtatute of Weſtm. 1ſt. (*a*), which directs ſuch perſons to be taken and impriſoned till they had found the perſon by whom the ſpeech was moved: but this being not likely to produce the effect intended, it was enacted by ſtat. 12 Ric. II. c. 11. that, ſhould he not be able to find ſuch perſon, he ſhould be puniſhed by the advice of the council, notwithſtanding the ſaid ſtatutes.

We have hitherto met with nothing on the ſubject of *public* nuiſances: we find now a ſtatute (*b*), ordaining proclamation to be made for removal of public nuiſances; ſuch as offal thrown in the ſtreets and ditches near towns; with a penalty of forty ſhillings on offenders, who were to be called before the chancellor by writ, if they refuſed to remove the annoyance. By another act, the laws againſt maintenance were directed to be enforced (*c*).

Notwithstanding the act paſſed in the laſt reign to prevent the frequent granting of pardons, great clamour was ſtill made on this ſubject. We find the commons had petitioned that the king might grant no more pardons. To this the king refuſed to conſent, but agreed to the following act (*d*), ordaining that no charter ſhould be allowed before any juſtice for murder, or for the death of a man ſlain by await, aſſault, or malice prepenſe, for treaſon, or rape of a woman, *unleſs* the fact was ſpecified in the charter: and where the pardon of the death of a man was exhibited without ſpecifying the fact, the juſtices were to inquire, by an inqueſt of the vicinage where the fact was committed, whether the murder was by await, aſſault, or malice prepenſe; and if it was found to be either, the pardon was to be diſallowed. If any one ſued for a pardon for the death of a man ſlain in either of the above ways, the chamberlain was to indorſe on the bill the name of the perſon ſuing, under pain of a thouſand marks, and the under-chamberlain under that of five hundred. Theſe bills were always to be directed to

(*a*) Part I. 386. (*b*) 12 Ric. II. c. 13. (*c*) 1 Ric. II. c. 4. (*d*) Stat. 13 Ric. II. ſt. 2. c. 1.

the

the keeper of the privy ſeal; nor was any warrant of the privy ſeal to be made out without a bill ſo ſigned and indorſed. No charter of pardon of treaſon, or felony, was to paſs the chancery without a warrant of the privy ſeal, but where the chancellor might grant it *ex officio*, without ſpeaking to the king; and great penalties were to be paid by thoſe who ſued pardons in any of the above crimes; that is, an archbiſhop or duke was to forfeit a thouſand pounds, and ſo in proportion of leſſer dignities; a clerk, batchelor, or other of leſs eſtate, two hundred marks. But the whole of this ſtatute, except that relating to a ſpecification of the fact, and an inquiry of the truth of it by an inqueſt, was repealed by ſtat. 16 Ric. II. c. 6.

The ſtat. 2 Ric. II. c. 4. may be ranked among the penal laws of this reign. This ordained, that mariners, who had been *arreſted* and retained for the king's ſervice, and then fled, ſhould, beſides forfeiting double what they had taken for wages, ſuffer a year's impriſonment: this offence was to be inquired of before the admiral, or his lieutenant. It appears by this act, that mariners uſed then to be *compelled* into the ſervice in a way which the legiſlature did not ſcruple to call an *arreſt*; ſignifying as compulſory a method as the law made uſe of on any occaſion. The carrying of gold or ſilver out of the kingdom was forbidden by ſtat. 5 Ric. II. ſt. 1. c. 2. under the penalty of forfeiting all that the offenders could forfeit: prelates were not to export their payments, even by exchange, without licence. All perſons were by the ſame act reſtrained from going beyond ſea, without the king's licence (and then it was to be only at certain ports): thoſe who offended therein were to forfeit all their goods; and the perſons carrying them to forfeit their veſſel. This law continued in force till the time of James I. (*a*)

Some grievances in the manner of executing the foreſt laws were removed by ſtat. 7 Ric. II. c. 3, 4. It was provided, that no jury ſhould be compelled by any officer of the foreſt, or other, to travel from place to place, out of the place where their charge was given, unleſs they ſo pleaſed; *nor were they*, ſays the act, *to be conſtrained to give a verdict otherwiſe than according to their conſcience.* Again, no one was to be taken or impriſoned by any officer of the foreſt without indictment, or being taken with the manner, or treſpaſſing in the foreſt; nor was any one to be compelled to make an obligation or ranſom to an officer of the foreſt: and any one offending againſt this act was to pay the party damnified double damages, and to

(*a*) Stat. 4 J. I. c. 1. § 22.

be

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be fined to the king. While theſe reſtrictions were impoſed on the old foreſt-law, a ſort of new foreſt-law began to ſhew itſelf; which, ſince it has, in later times, been greatly extended, is endured with as little acquieſcence as the old; being calculated, like that, to promote the pleaſures of the great by reſtraining thoſe of the inferior: but this is, perhaps, attended with particular circumſtances of aggravation; for whereas the old law was for the protection of the king's diverſions, and was local; this is in favour of all lords and great landholders, and extends to every ſpot of ground in the kingdom: ſo that, coming more nearly home to the obſervation of men, it is more generally felt, though indeed leſs ſeverely, than the foreſt-law. The deſign of the firſt act on this ſubject will appear from the preamble: "Foraſmuch as "divers artificers, labourers, ſervants, and grooms keep greyhounds and "other dogs, and on the holidays, when good chriſtian people be at church "hearing divine ſervice, they go hunting in parks, warrens, and connigries "of lords and others, to the very great deſtruction of the ſame; and ſome-"times under ſuch colour they make their aſſemblies, conferences, and con-"ſpiracies to riſe, and diſobey their allegiance." Thus was the ſafety of the ſtate, as on other occaſions, made a reaſon for impoſing the following reſtrictions; for it was ordained by ſtat. 13 Ric. II. ſt. 1. c. 13. that no artificer, labourer, nor any other layman, not having lands or tenements of forty ſhillings per ann. nor prieſt, or other clerk (if not advanced to the value of ten pounds per ann.) ſhould keep any greyhound, hound, or other dog to hunt; nor uſe ferrets, keys, nets, hare-pipes, nor cords, or other engine, to take or deſtroy deer, hares, conies, or other *gentlemen*'s (*a*) game, on pain of a year's impriſonment; to be enquired of by the juſtices of the peace. This was the firſt ſtone in the preſent fabric of *game laws*; and ſeems merely a regulation of the police, to reſtrain the lower orders of people from miſpending their time in a way that was neither uſeful to themſelves nor the community.

Juſtices of the peace.

THE authority of juſtices of the peace was conſiderably enlarged in this reign, and ſeveral regulations were made for the due holding of their ſeſſions, the proper choice of perſons to fill this office, and other matters concerning their juriſdiction. By ſtat. 7 Ric. II. c. 5. they had power to inquire of vagabonds, and compel them to find ſureties for their good behaviour, otherwiſe to commit them to priſon till the coming of the juſtices of gaol-deli very. The next ſtatute reſpecting juſtices of the peace is ſtat. 12 Ric. II.

(*a*) *Des gentils.*

c. 10.

c. 10. which enacts, that in every commiſſion of the peace there ſhould be aſſigned but ſix juſtices, beſides the juſtices of aſſiſes (who were always *ex officio* put into the commiſſion); and theſe ſix juſtices were to hold their ſeſſions every quarter of a year at leaſt, and by three days, if need were, on pain of being puniſhed at the diſcretion of the king and council, at the ſuit of any one who would complain. They were to inquire, if mayors, bailiffs, and others, properly executed what was required of them in the ordering of beggars and vagabonds, ſervants and labourers; and to puniſh defaults. The juſtices were each to have four ſhillings a-day during the ſeſſions, and two ſhillings for their clerk; this to be paid by the ſheriff, out of the fines and amercements ariſing at the ſeſſions. By ſtat. 13 Ric. II. ſt. 1. c. 7. it was ordained, that juſtices ſhould conſiſt of the moſt ſufficient knights, eſquires, and gentlemen of the law, of the county, without any exemption for the ſtewards of lords, as was given by the former act; and they were to be ſworn to put in execution all the ſtatutes relating to their office. By ſtat. 14 Ric. II. c. 11. there were to be eight juſtices in every county. As ſome lords had been put into the commiſſion at that parliament, it was ordained that no duke, earl, baron, or banneret ſhould take any wages; and the wages were to be paid by indenture between the juſtices and the ſheriff. The next ſtatute relating to theſe juſtices was ſtat. 15 Ric. II. c. 2. before-mentioned, which gives them authority to proceed in a ſummary way in caſes of forcible entry. By ſtat. 17 Ric. II. c. 9. they were made conſervators of ſome old ſtatutes for preſervation of ſalmon, and the fry of fiſh. The laſt act on this head is chap. 10. of the ſame ſtatute, which ordains, that in every commiſſion of the peace there ſhould be, if need was, two men of the law of that county, who ſhould make deliverance of thieves and felons as often as they might think it convenient.

THUS far of the ſtatute-law of Richard II. The acts of Henry IV. we ſhall ſtate in a ſimilar order; beginning with thoſe concerning the parliament, and clergy.

Statutes of Hen. IV.

SEVERAL laws were made to regulate the election of members to parliament. In the fifth of the king a ſpecial act was paſſed, to puniſh a perſon who had aſſaulted, and beat and wounded a menial ſervant to one of the knights repreſenting the county of Somerſet, during the time of parliament.

It

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It was enacted (*a*), that proclamation ſhould be made where the fact was done, commanding the offender to appear in the king's bench within a quarter of a year; if not, to be attainted of the fact, and pay the injured party double damages, to be taxed by the judges, or, if need were, by an inqueſt; and pay a fine to the king; *and ſo was it to be in all ſimilar caſes.* It was in the ſame parliament prayed, that all perſons who arreſted a knight, or burgeſs, or any of their ſervants, knowing them to be ſuch, ſhould be fined at the king's pleaſure, and render treble damages to the party grieved. To this it was anſwered, that there was a ſufficient remedy already (*b*). What this remedy was does not appear, unleſs it intimates, that the privilege was ſo notorious and eſtabliſhed, as to intitle the party injured to an action.

Election of members.

It was complained in parliament, that the election of knights of counties was ſometimes made according to the pleaſure of the ſheriffs, and generally againſt the form of the writ directed to the ſheriff. To prevent this in future, it was enacted by ſtat. 7 Hen. IV. c. 15. that the election of knights ſhould be in the following way; namely, at the next county to be held after the delivery of the writ of the parliament, proclamation was to be made in the full county of the day and place of the parliament; and that all thoſe then preſent, as well ſuitors duly ſummoned for that cauſe, as others, ſhould attend to the election of knights; and then, in full county, they were to proceed freely and indifferently, notwithſtanding any requeſt or command to the contrary. After they were choſen, their names were to be written in an indenture, under the ſeals of all thoſe who choſe them, and tacked to the ſame writ of parliament; which indenture, ſo ſealed and tacked, was to be held for the ſheriff's return of the ſaid writ, as far as concerned the knights of the ſhire. It was alſo enacted, that in the writs of the parliament in future, this clauſe ſhould be put; *et electionem tuam in pleno comitatu tuo factam diſtinctè et apertè ſub ſigillo tuo, et ſigillis eorum qui electioni illi interfuerint, nobis in cancellariâ noſtrâ ad diem et locum in brevi contentos certifices indilatè.* But, becauſe no penalty was inflicted by this ſtatute on ſheriffs who did not conform to it, it was ordained by ſtat. 11 Hen. IV. c. 2. that the juſtices of aſſiſe ſhould inquire of ſuch returns in their ſeſſions; and if it was found by inqueſt, and due examination before them, that a ſheriff had made a return contrary to this act, he was to be fined one hundred pounds; and knights ſo unduly

(*a*) Ch. 6. (*b*) Cott. Abri. p. 433. § 74.

returned

returned were to loſe their wages. Before theſe two acts there was no ſtatute relating to this matter, unleſs the ſtatutes of Edward I. for free elections could be conſidered as ſuch.

THE laws relating to the rights of property were few; being only thoſe which concerned the king's grants. It ſhould ſeem that Henry, as well as Richard, had been too eaſy in making grants to his favourites: to prevent this in future, it was endeavoured to avoid the miſrepreſentations and deceits which uſed to be impoſed on the king to obtain thoſe grants. Thus it was provided, by ſtat. 1 Hen. IV. c. 6. that all thoſe who demanded lands, tenements, rents, offices, annuities, or any other profits, ſhould make expreſs mention in their petitions of the value of the thing, and alſo of ſuch things as they before had of the gift of the crown; and in failure of this, the grant was to be void. Again, it was ordained *(a)*, that where lands were granted to the king without title found by inqueſt, or the king otherwiſe intitled to enter, thoſe who were diſſeiſed by the king's patentees ſhould have a *ſpecial aſſiſe*, without the chancellor ſpeaking to the king; and if they recovered, ſhould have treble damages. The ſtatute requiring the value, of the thing petitioned for, to be ſpecially mentioned, was explained by ſtat. 2 Hen. IV. c. 2. which, among other matters, excepts all confirmations and licences to be made by the king; and theſe were not to be void, though the petition did not mention the value. Stat. 4 Hen. IV. c. 4. went ſtill further than the firſt; for, declaring that the king would make grants to none but thoſe who deſerved it, and as it ſhould ſeem beſt to himſelf and his council; all thoſe who made any demand contrary thereto were to be puniſhed by the advice of the king and council, and never have their demand. After this, a further explanation was made of ſtat. 1 Hen. IV. by excepting the queen and the king's ſon *(b)*.

Of the clergy.

THE two grand objects of reformation in church matters, the reſtraining the interference of papal authority, and providing for the regular maintenance of vicars, were proſecuted in this reign. The weapon now uſed againſt the pope and his adherents, was the ſtatute of proviſors, 13 Ric. II. ſt. 2. c. 3. which had put the proceeding by *præmunire facias* into a ſtricter courſe. Many new caſes were now brought within the penalty of this law. It was enacted by ſtat. 2 Hen. IV. c. 3. that if proviſion was made by the

(*a*) Ch. 11. (*b*) Stat. 6 Hen. IV. c. 2.

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biſhop of Rome to any perſon, religious or ſecular, to be exempt from obedience regular, or to have any office perpetual within houſes of religion, or as much as one regular perſon of religion, or two, or more, had in the ſame, and ſuch proviſors accepted the ſame, they were to incur the pains of ſtat. 13 Ric. II ſt. 2. c. 3. Again, becauſe complaint was made that the *Ciſtertians* had purchaſed bulls to be diſcharged of tithes, which exemption uſed to be extended to their tenants, it was enacted *(a)*, that they ſhould continue in the condition they were in before the purchaſe of ſuch bulls; and they and all other orders which purchaſed other bulls, or by colour of any bulls pretended to avail themſelves of a diſcharge from tithes, were to be warned to appear in two months by writ of *præmunire facias*; and if they made default, or were attainted, were to incur the penalties of the before-mentioned act of Richard II.

Vicars inſtituted and inducted.

THESE were the ſecurities provided for the due payment of tithes, when an act was paſſed in aid of the ſtatute of Richard II. concerning vicars. It was by ſtat. 4 Hen. IV. c. 12. enacted, that the former ſtatute ſhould be duly obſerved; that licences of appropriation made ſince, ſhould be reformed according to the effect of that act; and if ſuch reformation was not made within a certain time, the appropriation and licence were to be void. All appropriations of vicarages ſince the firſt year of Richard II. were declared void. And further, it was enacted, that in every church ſo appropriated, or to be appropriated, a ſecular perſon ſhould be ordained vicar *perpetual*, canonically *inſtituted and inducted*, and *convenably endowed* by the diſcretion of the ordinary, to do divine ſervice, to inform the people, and to keep hoſpitality; and no religious perſon was to be made vicar in any church ſo appropriated. Thus was it at length ordained, that vicars ſhould have inſtitution and induction, which gave them the ſame tenure as parſons; and to avoid the abuſes which had been ſo long complained of, religious houſes were no longer ſuffered to appoint any of their own body to ſuch appropriated vicarages as belonged to them.

THE religious orders were no longer in ſuch conſideration as they had been. A ſtatute was made in this parliament reſtraining the four orders of friars; that is, the *friars minors*, *Auguſtines*, *preachers*, and *Carmelites*, from taking any perſon into their order, under fourteen years of age, without the aſſent of the parents of the child; and the chancellor was authorized, upon com-

(*a*) Ch. 4.

plaint

plaint duly made before him, to inquire into breaches of this ſtatute, and to puniſh the heads of the ſociety according to his diſcretion *(a)*.

FURTHER proviſion was made for the regular payment of tithes. It was enacted by ſtat. 5 Hen. IV. c. 10. that farmers and occupiers of the poſſeſſions of aliens ſhould be bound to pay all tithes due to parſons and vicars, notwithſtanding they were ſeiſed into the king's hands, or any prohibition to the contrary. Again, it was ordained by ſtat. 7 Hen. IV. c. 6. that no perſon ſhould be diſcharged of tithes by colour of any bulls; and if any were moleſted by pretence of ſuch bulls, the offenders were to be liable to the penalty inflicted on the *Ciſtertians* by ſtat. 2 Hen. IV. c. 4. Becauſe it had ſometimes happened, that proviſions from the pope had been licenſed by the king, it was enacted *(b)*, that no licence or pardon ſo granted ſhould be available, if the benefice was full of an incumbent at the time it was granted. Theſe *licences* ſhewed that the ſtatutes againſt proviſions were not executed with rigour. However, in the ninth year of this king *(c)*, a ſtatute was made, confirming all the ſtatutes againſt proviſions and tranſlations of biſhops, and *(d)* declaring, that the election to ſpiritual preferments ſhould be free. The other laws relating to church matters were ſuch as were made againſt hereſies; but theſe, unhappily for the firſt aſſertors of reformation in our church, were of a ſort which obliges us to rank them among thoſe which make a part of our criminal law.

NOTHING remarkable was ordained reſpecting the lower claſs of people, except a regulation about apprentices made by ſtat. 7 Hen. IV. c. 17. It was complained, that, notwithſtanding the ſtatute of Canterbury, ordaining that no perſon who had worked in huſbandry till twelve years of age ſhould be permitted to be put to any myſtery or handicraft; yet the children of many perſons having no land or rent, were bound apprentice to crafts in cities and boroughs, "*for the pride of cloathing, and other evil cuſtoms that ſervants do uſe in the ſame*;" which produced a ſcarcity of labourers and ſervants. To prevent this, it was enacted by the above act, that no one ſhould put their ſon or daughter apprentice to any craft, or labour within a city or borough, except he had land or rent to the value of twenty ſhillings per annum at leaſt; but they ſhould be put to other labour, as their eſtates required, on pain of one year's impriſonment. Any perſon willing to make his child apprentice, was to bring to the mayor or bailiff of the place a bill ſealed by

Statutes of labourers.

(a) Stat. 4 Hen. IV. c. 17. *(b)* Ch. 8. *(c)* Ch. 8. *(d)* Ch. 9.

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two juſtices of the peace, teſtifying the value of the parent's lands. Any perſon taking an apprentice contrary to this act, was to forfeit a hundred ſhillings, to be recovered by complaint to the juſtices of the peace. All labourers and artificers were annually to be ſworn at the leet, to obſerve the ſtatutes relating to their wages and ſervice; and if they refuſed, they were to be put in the ſtocks for three days. To facilitate this, it was provided, that every town or ſeignory not having ſtocks were to be fined a hundred ſhillings.

The juriſdiction of the court of admiralty ſtill continued to excite jealouſies; and many applications were made to parliament on the ſubject: theſe produced a ſtatute in the ſecond year of the king, when it was enacted, that the ſtatute of Richard II. ſhould be obſerved; and moreover, that whoſoever felt himſelf grieved contrary thereto, ſhould have his action by writ grounded upon the caſe againſt him who ſo ſued in the admiral's court, and recover double damages. The party was alſo to forfeit ten pounds to the king.

An attempt was made by the commons to effect an alteration in the judicature of the parliament. The commons, who had been called to parliament in the reign of Edward I. merely to conſent to taxes upon themſelves and their conſtituents; when they had diſcharged that office, were not any further conſidered, nor looked upon as a neceſſary part of the *legiſlature*. The attention which had been occaſionally ſhewn to their petitions for redreſs of grievances, by making ſtatutes in purſuance of them, was a matter of grace in the king and lords; and was uſually conferred to reward them for, or to purchaſe, a ſupply of money. In proportion as the king ſtood in need of this reſource, thoſe who held the purſe of the kingdom grew into importance.

The parliament and council.

The annual ſitting of parliament during the long reign of Edward III. had familiarized the commons ſo much to the condition of parliament-men, that they began to conſider themſelves as a part of the *legiſlature*; and their claim was ſo far favoured, that their aſſent is mentioned not only to the taxing of their conſtituents, but ſometimes to general laws for the government of the kingdom. Notwithſtanding this, matters purely of a judicial nature were ſtill conſidered as the ſole and excluſive province of the king and lords. It was a part of their original conſtitution to be the ſupreme court of the nation; and (it was thought) the admiſſion of the commons to aſſent to general laws could make no precedent that would intitle them to interfere with the judicature of parliament.

But

But the conſequence of allowing the commons to aſſent to laws in the time of Edward III. was, that during the reign of Richard II. this was ſettled by long uſage into a matter of right; and in the reign of Henry IV. they advanced their pretenſions ſo far, as to claim a participation in that judicial capacity which the lords had deemed to be ſolely their own. In this attempt they might reaſon upon very juſt ground. The awards, they might ſay, made by the king and lords in matters of private property are agreed to be the higheſt judgments that could be given; they are upon ſubjects which are not within the cogniſance of inferior courts; and the relief afforded is of a kind which diſpenſes with and over-rules the general courſe of the law: but the law cannot be diſpenſed with, nor altered otherwiſe than by an act of the legiſlature; therefore the aſſent of the commons, as a part of the legiſlature, is neceſſary in all theſe judgments on private petitions. In this manner might the commons have argued; and probably ſuch reaſoning as this induced them in the following inſtance to intimate their claim to this ſuppoſed right.

In the reign of Henry IV. there was a petition to the king in parliament on behalf of the reſtored archbiſhop, praying, that he might have recovery for ſundry waſtes and ſpoils againſt *Roger Walden*, who had been appointed to that ſee during his exile. The king inſtantly granted it, and it became an award in the uſual way. But the commons hearing of this, prayed the king, that ſince they were not made privy to the judgment, no record might be made to charge or make them parties therein; a language which was artfully enough contrived to conceal any conſciouſneſs that their interference might be thought new or ill-founded. But the king was more explicit in his anſwer: the archbiſhop, by his command, told them, *that the commons in parliament were only petitioners; and that all judgments belong to the king and lords, unleſs in ſtatutes and the like*; which ordinance the king willed ſhould be from that time obſerved (*a*). The commons acquieſced in this command of the king, and no further attempt was made in this and the two next reigns to participate in the judicature of the king and lords.

The juriſdiction of the parliament and council was ſtill viewed with a jealous eye. It was complained, that after judgment given in the king's courts, the parties were made to come, *upon grievous pain*, ſometimes before the king himſelf, ſometimes before the king's coun-

(*a*) 2 Parl. Hiſt. 50.

cil,

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cil, and ſometimes to the parliament, to anſwer there anew; which was conſidered as ſubverſive of the common law, as well as a great grievance to the people. To prevent this in ſome degree, it was enacted, by ſtat. 4 Hen. IV. c. 23. that after judgment given in the king's courts, the parties and their heirs ſhould continue in peace, until the judgment was undone by attaint or error, according to the old laws.

THO' the preamble of this ſtatute is only aimed at *ſubpœnas* ſummoning perſons before the king himſelf, the council, and the parliament; yet the enacting clauſe is ſo general, that it might be, and afterwards was, conſtrued as applicable to the equity-juriſdiction in chancery. It was an eaſy conſtruction to ſay, that all equitable conſiderations ariſing on ſuch judgments ſhould be ſilenced; and that no court, upon any ground, ſhould preſume to diſcuſs their propriety, or ſuſpend their effect.

THE commons had two years before gone further than the proviſions of this act reſpecting the two new courts of equity; for they prayed that no *ſubpœna* might iſſue out of the chancery or *exchequer* (*a*). It was alſo prayed in the ſame parliament, that there might iſſue out of the *exchequer* no more writs of *datum eſt nobis intelligi*. But to this it was anſwered, that the old uſage ſhould continue (*b*).

IT ſeems, that while the chancellor was trying all means to eſtabliſh his judicature, there begun ſilently to obtain in the court of exchequer a practice to entertain ſuits in the like manner by *ſubpœna*, and ſuggeſtions by bill; which proceedings are here complained of, as equally new and illegal with thoſe in chancery. It was not at all unnatural, that an equitable juriſdiction ſhould be exerciſed by the court of exchequer; for the cogniſance of the king's debts being confined to that court, it would have been hard indeed, that ſuitors there ſhould be deprived of thoſe equitable remedies which all common ſuitors might have in chancery; and as this court had a chancellor of its own, there ſeemed nothing wanting to complete the form and circumſtance of a court of equity. Thus, as common perſons ſued in chancery, it became the cuſtom for the king's debtors to file their bill in the exchequer. So ill founded is the opinion, that the court of equity in the exchequer was not heard of till the time of Henry VIII, and that it was founded on ſtat. 33 Hen. VIII. c. 39. (*c*). At length the connexion between a chancellor and a court of equity became ſo inſeparable, that it will be

(*a*) Cott. Abri. p. 410. § 69. (*b*) Ibid. p. 413. § 99. (*c*) 4 Inſt. 118.

hardly

hardly too general to pronounce, wherever that officer was, there was alſo that juriſdiction.

At another time, we find it was prayed by the commons, that the ſtatutes about *ſuggeſtions* made in the reigns of Edward III. and Richard II. ſhould be obſerved *(a)*. With all this ſolicitude to keep the juriſdiction of the council within bounds, we find more frequent mention of it, and more inſtances of its judicial powers, than in any former period *(b)*. Many applications were made to parliament concerning the bounds of juriſdiction of the conſtable and marſhal, and the ſteward and marſhal *(c)*, but no ſtatute was enacted on the ſubject.

Next, as to the courſe of proceeding, and other matters relating to the ordinary adminiſtration of juſtice. The grievous injury done by thoſe who made forcible entries, and otherwiſe got poſſeſſion of land, occaſioned ſome ſtatutes that rendered the proceeding by aſſiſe rather more expeditious: this was by granting of courſe a *ſpecial aſſiſe*, to enquire of the fact immediately, without waiting for the general commiſſion, which iſſued twice a-year. The firſt inſtance in which the parliament reſorted to this method, was, where perſons had obtained grants of the king, and by virtue of ſuch patents had turned out the true owners. It was enacted by ſtat. 1 Hen. IV. c. 8. that where lands were granted by the king's patent, without title found by inqueſt or otherwiſe, and the king had no entry by law, the perſon ſo diſſeiſed ſhould have a *ſpecial aſſiſe* of the chancellor's grant, *without any ſuit to the king*; and if he recovered, he was to have treble damages. The next inſtance in which ſpecial aſſiſes were to be granted without ſuit to the king, was, where *(d)* any one made forcible entry to the uſe of himſelf or of another, by way of maintenance, or took and carried away any goods from the poſſeſſor of the freehold after ſuch forcible entry; the party attainted in this way was to ſuffer a year's impriſonment, and yield double damages. In ſuch ſpecial aſſiſes were to be named a juſtice of one of the benches, or the chief baron, if he was a man of the law.

We have ſeen, that by the ſtatute of Richard II. diſſeiſees were enabled to bring their aſſiſe againſt the diſſeiſor if he took the profits, and the aſſiſe was brought within a year: this time was now thought too ſhort; and therefore, by ſtat. 4 Hen. IV. c. 7. they are allowed to bring their aſſiſe againſt the firſt diſſeiſor at any time during his life, if he took the profits. As to other real writs, the demandant was

(*a*) Cott. Abri. p. 422. § 78. (*b*) Cott. Abri. Hen. IV. paſſim. (*c*) Ibid. p. 411. § 79. p. 432. § 64. (*d*) Stat. 4 Hen. IV. c. 8.

to

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to commence his ſuit within a year againſt the perſon who was tenant of the freehold at the time the action accrued to him, if ſuch tenant *took the profits* at the time the ſuit was commenced. Such proviſions as theſe were called ſtatutes *of pernors of profits*, and were followed by ſeveral others in the ſubſequent reigns. Becauſe in aſſiſes of novel diſſeiſin, and other real writs, it had been common, where lands lay in antient demeſne and within franchiſes, to charge the bailiff, lord, mayor, or other chief officer, as a wrong-doer, in order to deprive him of the benefit of his franchiſe in that inſtance, it was enacted by ſtat. 9 Hen. IV. c. 5. that in ſuch caſes the juſtices of aſſiſe ſhould (if the perſons required it) firſt enquire by the aſſiſe in the country whether they were really diſſeiſors or tenants; and if it was found that they were named by colluſion and fraud, the writ was to be abated, and the plaintiffs to be in grievous mercy. The other ſtatute relating to real writs is ſtat. 4 Hen. IV. c. 22. concerning the remedy incumbents were to have, if ejected by the king's preſentee; and they were hereby permitted to ſue at any time, without being confined to the term of a year, as they had been by ſome late acts *(a)*.

Some few regulations were made reſpecting perſonal actions, and actions in general. It was enacted by ſtat. 2 Hen. IV. c. 7. where a matter was adjourned on account of ſome difficulty, after a verdict, that, if the verdict had paſſed againſt the plaintiff, he ſhould not be nonſuited; meaning, that he ſhould be barred by the verdict. This expedient of plaintiffs reſorting to a nonſuit, was uſed on other occaſions. The commons prayed, that when the defendant had waged his law, the plaintiff might not be nonſuited; but no ſtatute was made to prevent it *(b)*. We have ſeen, in the reign of Edward III. a defendant uſed not to be admitted to wage his law againſt an account, if ſettled before auditors *(c)*. It was complained, that this point of law had been much abuſed; for plaintiffs would, in an action of debt upon arrearages of account, ſurmiſe that the defendant had accounted before auditors; which auditors might, perhaps, be only the apprentice or ſervant to the plaintiff; and in truth no account had been taken, nor was any thing really due; but the plaintiff would get a favourable inqueſt, and ſo obtain a recovery. To prevent this, it was enacted, that the juſtices in the king's courts, and other judges before whom ſuch actions in cities and towns were brought, ſhould have power to examine the attornies and others, and thereupon re-

(*a*) Stat. 25 Ed. III. ſt. 3. c. 3. Stat. 13 Ric. II. ſt. 1. c. 1. (*b*) Cott. Abri. p. 466. § 33. (*c*) Vid. ant.

ceive

ceive the defendant to his law, or try the ſame by inqueſt, according to their diſcretion.

Some ſtatutes were made for the government of proceſs. It was enacted by ſtat. 5 Hen. IV. c. 12. that where a ſtatute-merchant ſhould be certified into chancery, and a writ awarded, and returned into the common-pleas, and the ſtatute there *once* ſhewn, the juſtices might re-continue the proceſs till full execution was had, without a ſecond view of the ſtatute. Becauſe many people were outlawed by erroneous proceſs, and by reaſon of ſickneſs could not appear in perſon, as the law required; to reverſe ſuch outlawries, it was enacted by ſtat. 7 Hen. IV. c. 13. that the juſtices and chief-baron ſhould examine ſuch perſons, and thereupon admit their attornies: however, the writ of *capias ad ſatisfaciendum* was to continue as at common law. That the execution of proceſs might not be defeated by thoſe who had the cuſtody of perſons impriſoned, it was enacted, by ſtat. 7 Hen. IV. c. 4. that, in an action againſt a gaoler for an eſcape, no protection ſhould avail.

For the ſafe keeping of records, and alſo to preſerve them intire and unaltered, it was ordained by ſtat. 11 Hen. IV. c. 3. that the juſtices of aſſiſe ſhould cauſe to be delivered in the king's treaſury all records of aſſiſes of novel diſſeiſin, of mortaunceſtor, and of certifications (with all appurtenances and appendages), before them determined. And further it was provided, that the records and proceſs of pleas real and perſonal, and of aſſiſes of novel diſſeiſin and mortaunceſtor, certifications and others, whereof judgment was given and enrolled, or things touching ſuch pleas, ſhould in no wiſe be amended or impaired by new entering of the clerks, or by the record or thing certified, in witneſs, or commandment of any juſtice, in any term after judgment given and enrolled.

The extortion of ſheriffs, and the ferms of their bailiwicks, occaſioned ſome few regulations of the ſame ſort with thoſe that have been frequently before mentioned *(a)*. At length it was enacted by ſtat. 4 Hen. IV. c. 5. that ſheriffs ſhould abide in their bailiwick during their office, and ſhould not let it to ferm to any one: and theſe two points were to be inſerted in the ſheriff's oath.

The parliament began to make ſome proviſion for ordering *attornies*, who had now become a very conſiderable body of men *(b)*. Complaint had been made of the miſchiefs ariſing from their ignorance and want of

(*a*) Stat. 1 Hen. IV. c. 11. (*b*) Vid. ant. 13.

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knowledge in the law; and therefore, to make ſure of their qualifications, it was ordained, by ſtat. 4 Hen. IV. c. 18. that all attornies ſhould be examined by the juſtices, and by their diſcretions their names put in a roll: they were to be *good and virtuous*, and *of good fame*; and, if ſo, they were to be received and ſworn well and truly to ſerve in their offices, and eſpecially that they make no ſuit in a foreign county: all other attornies were to be put out, and ſuch as were paſſed in the above manner were to be put in their places by their *maſters*, that is, by their clients. It was enacted, that when qualified attornies died, or ceaſed to act, the juſtices might appoint others in their room, being virtuous and learned, and ſworn as above mentioned. It was enacted, that if any attorney was found notoriouſly in default of record, or otherwiſe, he ſhould forſwear the court, and never be received to make ſuit in any of the king's courts: this ordinance was alſo to be obſerved in the exchequer, at the diſcretion of the treaſurer and barons. It was again ordained, by chap. 19. of the ſame act, that no ſteward, bailiff, nor miniſter of lords of franchiſes, having return of writs, ſhould be attorney in a plea within the franchiſe. It ſeems as if ſome act was made on this ſubject in the 11th year of this king (though it does not now appear); for in the 13th year the clerks and attornies of both the benches prayed a revocation of it. The anſwer of the parliament to that petition was, that the juſtices of both the benches ſhould conſult about it, and alſo concerning other miſchiefs in the ſaid courts (*a*). In this reign ſome acts were made for ſettling the fees of courts; as thoſe of the marſhal, of the chirographer, the clerk of the crown, and the like (*b*). Some regulations were alſo made to prevent the embezzling of writs on which fines were levied, and ſubſtituting other fees, and notes of fines, in the place of the true ones (*c*).

THE vindication of Henry and his adherents required that the articles of treaſon enacted in the 21ſt year of the laſt reign, ſhould not be ſuffered to continue in force. In the 1ſt year of Henry IV. it was enacted, that whereas in the 21ſt year of Richard II. divers pains of treaſon were enacted by ſtatute, *inſomuch that no one knew how he ought to behave himſelf, to do, ſpeak, or ſay, for doubt of ſuch pains*; therefore, in no time to come any treaſon ſhould be adjudged otherwiſe than as was ordained by ſtatute in the preceding reign; meaning the ſtatute of treaſons 25 Ed. III. This meaſure of repealing new-enacted treaſons, by declaring all void but thoſe contained in

Repeal of treaſons.

(*a*) Cott. Abri. p. 483. § 49. (*b*) Stat. 2 Hen. IV. c. 8. 10. 23. (*c*) Stat. 5 Hen. IV. c. 14.

the

the ſtatute of Edward III. was reſorted to in later times, when the law had been occaſionally overſtrained to anſwer particular purpoſes.

THE ſame motives of favour to his partiſans, which induced Henry to paſs the above act, led him to conſent to ſome laws of an oppoſite nature; for in the next year after this humane ſtatute was paſſed, the king, at the inſtigation of the clergy, by whom he had been materially ſerved at the time of his claiming the crown, conſented that ſome rigorous meaſure ſhould be deviſed againſt the *heretics*, or *Lollards*, as they were then called. The puniſhment of *heretics* by burning, is mentioned in Bracton; and this was in England, as in all other chriſtian countries, the pain which the bigotry of religious zealots had agreed in inflicting upon all thoſe who oppugned the eſtabliſhed ſuperſtitions. Notwithſtanding this, it has been a doubt whether the writ *de hæretico comburendo* was a common-law proceſs, or was given by this ſtatute; tho' it ſhould ſeem from the ſcope as well as wording of this act, that the biſhop was hereby enabled to direct execution without the intervention of this writ; for it enacts, that *credence ſhould be given to the dioceſan* by the ſheriff, who was to receive the offender, and cauſe him to be burnt. So far, therefore, from appointing or even confirming this writ, the preſent act ſeems in ſome degree to ſuperſede it.

Heretics.

AT preſent there was no temporal law in force againſt hereſy; for the ſtatute of Richard II. which was the firſt made on that ſubject, and had been obtained ſurreptitiouſly, was repealed the next year, as has been before ſhewn. The ſtat. 2 Hen. IV. c. 15. was now made, containing, like other acts upon clerical matters, a minuteneſs and length not uſual in the ſtatutes of this period. The meetings of heretics in their conventicles and ſchools are ſtigmatized in this act with the name of confederacies to ſtir up ſedition and inſurrection; the very pretence that had been made uſe of by the Romans againſt the primitive Chriſtians, and which had been adopted by the Romiſh church ever ſince, to ſuppreſs all oppoſition to, or reformation of, its errors. To prevent perſons of this deſcription from eſcaping out of the biſhop's dioceſe, it was now ordained, that none ſhould preſume to preach openly or privily without the licence of the dioceſan of the place firſt had and obtained, except curates in their churches. None were to hold, teach, or inſtruct, openly or privily, or write any book contrary to the Catholic faith or determination of holy church, nor make conventicles, or hold ſchools; nor were any to maintain thoſe who did. All perſons having ſuch books or writings, were to deliver them to the dioceſan within forty days

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from the proclamation of this ſtatute; and thoſe who did not ſo deliver them, or who otherwiſe offended againſt this act, and all thoſe defamed and evidently ſuſpected thereof, were to be arreſted by the direction of the ordinary, and committed to priſon till they canonically purged themſelves, or abjured their opinions: the ordinary was to proceed according to the canonical decrees, and determine the matter within three months from the arreſt. If the party was canonically convict, he was to be confined in priſon at the diſcretion of the ordinary, and moreover *to be put* to the ſecular court (except in caſes where, according to the canonical decrees, he was entitled to exemption), to pay a fine to the king; which fine was to be aſſeſſed by the dioceſan, and certified to the exchequer, to be levied by proceſs from thence. Thus far of thoſe canonically convicted; but farther, if perſons ſententially convict refuſed to abjure their opinions, or after abjuration relapſed, a more rigorous courſe was directed: ſuch perſons were by the canons to be left to the ſecular arm; and it was now enacted, that, in ſuch caſes, *credence ſhould be given to the dioceſan* or his commiſſary, and the ſheriff, and mayor or bailiff of the place, ſhould be preſent when the ſentence was given, if required by the dioceſan or commiſſary, and, after ſentence promulgated, ſhould receive, *and them before the people in a high place cauſe to be burnt*, to the example and terror of others. It is obſerved reſpecting this firſt ſtatute againſt the preachers of new opinions, that the print differs conſiderably from the record, ſo as to give a ſharper edge to this proceeding (*a*). We find it recorded in this ſame parliament, that a writ was ſent to the ſheriffs of London for the burning of *William Sawtree*, clerk, convicted by the clergy (*b*). This was according to the antient courſe, by iſſuing the writ *de hæretico comburendo*; for the new method directed by this act put the whole authority into the biſhop's hands; and as he might direct his ſentence to be executed without the writ, the perſecution againſt the followers of *Wickliffe* was likely to be more warm than before. In the 8th year of the king the prelates got a long and ſanguinary bill to be exhibited in parliament againſt the ſpreaders of new opinions, calling them *Lollards*. This bill was to empower every officer or miniſter whatſoever to apprehend and enquire of ſuch Lollards, and that no ſanctuary ſhould be allowed them; but the church-men were not gratified in this inſtance (*c*). In the 11th year it was prayed by the commons, that perſons arreſted under ſtat.

(*a*) Cott. Abri. p. 409. § 48. (*b*) Ibid. p. 407. § 29. (*c*) Ibid. p. 456. § 62.

2 Hen.

2 Hen. IV. might be bailed, and freely make their purgation, and that they might be arreſted by none but ſheriffs, or the like officers, nor any havock be made of their goods; but this relaxation of the new courſe againſt heretics was not paſſed into a law (*a*).

Multiplication.

THE notion of producing gold out of other metals, by a chemical proceſs, and the infatuation with which it was purſued, occaſioned a law to be made in this reign againſt theſe experiments. This proceſs was ſometimes called *multiplication* and to *multiply*, becauſe it was with a view to increaſe the quantity of metals, though in reality it ſeldom had any other effect than diminiſhing that which the credulous adventurer poſſeſſed before the operation began. The pretence of poſſeſſing this ſecret of changing metals had been practiſed by cheats, to draw ſupplies out of the pockets of thoſe who believed in it; and had been ridiculed, before this time, in one of Chaucer's Tales; where a perſon who had been tricked of his money in this way, after a minute account of the proceſs and the deception, ſays, "*Lo, which avantage is to* MULTIPLIE (*b*)!" Beſides the miſchiefs here mentioned, which, perhaps, might be better left to experience to correct, without making them the object of legiſlative notice, it is moſt probable that this impoſture was many times held forth as a cover to the real operation of coining baſe money, in which light it became a matter of ſerious and national concern. It was for this reaſon, and perhaps under ſome ſmall apprehenſion that the proceſs of changing metals might by poſſibility ſucceed, that it was enacted by ſtat. 5 Hen. IV. c. 4. that any one who multiplied gold or ſilver, or uſed the craft of multiplication, and was attainted thereof, ſhould incur the pain of felony.

BECAUSE many perſons were beat and maimed, and afterwards had their tongues cut out, or their eyes put out, it was by the ſame ſtatute (*c*) made felony for any one ſo to cut tongues, or put out the eyes of any one, if it was proved to be done with malice prepenſe. This ſhews that mayhem was not now conſidered as a felony of life and limb; for though cutting out tongues did not come under that conſtruction, yet putting out eyes was a mayhem at common law. Theſe were all the felonies enacted in this reign. The miſdemeanors, beſides what may have been mentioned in different parts of this reign, were few. The ſtatute 12 Ric. II. c. 6. againſt unlawful games, was confirmed by ſtat. 11 Hen. IV. c. 4. and it was moreover ordained, that labourers and ſervants offending againſt it ſhould be impriſoned for ſix days.

(*a*) Cott. Abri. p. 472. § 29. (*b*) Tyrwh. Cant. Tales, vol. iii. p. 95. (*c*) Ch. 5.

All

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All mayors, bailiffs, and conſtables of towns were to put this ſtatute in force.

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SEVERAL laws were made to regulate criminal proceedings. The *appeals* in the reign of Richard II. brought againſt lords and others, were of a ſingular nature, and probably occaſioned the ſtat. 1 Hen. IV. c. 14. which ſtates, that many and great inconveniences had ariſen heretofore from appeals; and, to prevent the like in future, it provides, that all appeals of things done within the realm ſhould be tried and determined by the good laws of the realm; and of things done out of the realm, before the conſtable and marſhal of England; and no more appeals were to be in parliament.

Pardons to provors.

THE too eaſy granting of pardons to approvors was reſtrained by ſtat. 5 Hen. IV. c. 2. This act ſtates, that divers common and notorious felons would, upon their arraignment, in order to ſave their lives, become approvors; ſo that in the mean time by brockage, grants, and gifts to be made to ſeveral perſons, they might obtain their charters, and after their deliverance become more notorious felons than they were before. To prevent this, it provides, that if any perſon ſued for a pardon in ſuch caſe, his name ſhould be inſerted in the charter, with mention that it was granted at his inſtance; and if the provor became afterwards a felon, the perſon ſuing the pardon was to forfeit 100l.

Inſidiatores viarum, &c.

SOME circumſtances relating to the perſonal benefit of clergy were ſettled and explained. It was ſtated by ſtat. 4 Hen. IV. c. 2. that the king was willing to be gracious to the clergy in their affairs, in return for the part they had taken in his favour when he came to the crown; and therefore he confirmed in the fulleſt manner the ſtatute *de clero*, 25 Ed. III. and further, conſidering that the words *inſidiatores viarum, et depopulatores agrorum* (which had been mentioned in a petition of the clergy to parliament) were not commonly uſed in indictments in the time of Edward III. and his progenitors; and being willing, for the quiet of the people, to avoid ſuch novelties, he cauſed it to be enacted, that ſuch words ſhould not be uſed in indictments, arraignments, appeals, or any other impeachments; and though indictments to that effect might be taken, neither thoſe words, nor words to that effect, ſhould prevent any one from having the privilege of holy church, but they ſhould be delivered to their ordinaries without any impeachment (*a*). As the Lollards were ſtigmatized with the ſuſpicion of being diſorderly vagabonds, who wandered about the

(*a*) Ch. 2.

country

country doing great miſchief, the above general charge was contrived to be inſerted in indictments againſt them; and it had been the opinion of the judges, that perſons ſo convicted ſhould be deprived of their clergy. In the next chapter of the ſame ſtatute it is recorded, that the archbiſhop of Canterbury, for himſelf and the other biſhops, had promiſed the king, that whenever a clerk religious, or ſecular, convicted of treaſon not touching the king, nor his royal majeſty, or a common thief, and ſo notoriouſly holden, ſhould be delivered to the ordinary as ſuch, that the ordinary ſhould keep him ſafely and ſurely, and according to a conſtitution provincial *to be* made by the archbiſhop and biſhops, in purſuance of letters of the late archbiſhop, dated 12th Mar. 1351 *(a)*, in which conſtitution were to be ordained certain pains for the obſervance of it; and it was enacted that no ſuch convict ſhould make his purgation contrary to the form of that conſtitution. The conſtitution here mentioned was to be ſhewn to the king in this parliament, but there is no evidence that it ever was made.

All the acts that have hitherto been mentioned, requiring jurors to be of a particular deſcription and qualification, related only to thoſe jurors who tried iſſues; but ſome preſentments having lately been made at Weſtminſter by outlaws, and ſanctuary-perſons not properly returned by the ſheriff, it was provided by ſtat. 11 Hen. IV. c. 9. that no indictment ſhould be made but by inqueſt of the king's lawful liege people, returned by the ſheriffs or bailiffs of franchiſes, without any nomination to the ſheriffs or bailiffs of franchiſes of the perſons that ſhould be returned, except by the officers ſworn and known; and all indictments contrary to this act are declared void. Notwithſtanding the many alterations made in the qualifications of jurors in ſubſequent times, and the ſolicitude ſhewn to chuſe them from among thoſe that were thought, from their rank and character, to be above temptations to corruption, nothing further was provided reſpecting thoſe jurors who found indictments.

Because the people of the county of Cheſter committed felonies in the neighbouring counties, and then eſcaped into that principality, it was ordained, that proceſs of exigent ſhould be iſſued againſt ſuch perſons in the county where the fact was done; and if they eſcaped into the county of Cheſter, the outlawry or exigent ſhould be certified to the officers and miniſters of that county, who ſhould take the party, and ſeiſe his lands and goods

(*a*) Vid. ant. 118.

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as forfeit to the prince or lord of the principality, the king ſtill having his year day and waſte; but the lands out of the principality were to go as thoſe of perſons living in other counties. The ſame method was to be obſerved in caſes of treſpaſſes committed out of the county of Cheſter.

THE laſt ſtatute in this reign (*a*) has made ſome alteration in the ſummary method which had lately been deviſed to ſuppreſs and puniſh rioters. It was hereby ordained, whenever any riot, aſſembly, or rout of people was made againſt the law, that the juſtices of the peace, three, or two of them at the leaſt, and the ſheriff and under-ſheriff, ſhould come with the power of the county (if need were) to arreſt them, and ſhould have authority to record what they found done in their preſence againſt the law; by which record the parties were to ſtand convicted, in the ſame manner as had been before provided by the ſtatute of forcible entries (*b*). If the offenders were gone before the juſtices and the ſheriff came, then they were to inquire within a month after the fact, and hear and determine it according to law. If the truth of the matter could not be found in the above way, they were to certify the king and his council of the matter; which certificate was to have the force of a preſentment by twelve men, and the offenders were to be put to anſwer thereon, and, if found guilty, were to be puniſhed at the diſcretion of the king and council. If the parties traverſed the matter ſo certified, the certificate and traverſe were to be ſent into the king's bench, and there tried and determined. If the offenders did not appear before the council, or in the king's bench, at the firſt precept, then a ſecond was to iſſue; and if they were not found, then the ſheriff, or under-ſheriff, was to make proclamation in the full county next enſuing the delivery of the ſecond precept, that they ſhould appear in the council or king's bench; or, if in time of vacation, in the chancery, within three weeks then next following; and if they did not appear, they were to ſtand convicted. The juſtices dwelling neareſt the place, with the ſheriffs and juſtices of aſſiſe, were to execute this ſtatute, under the penalty of 100l. for every default.

THE above act tended to increaſe the authority of juſtices of the peace, who were daily growing in conſequence, many matters relating to the police being ſubmitted to their cogniſance by different acts of parliament. This authority was ſometimes abuſed. We find that conſtables of caſtles would get themſelves to be aſſigned juſtices of the peace, and under colour of that

(*a*) 13 Hen. IV. c. 7. (*b*) Stat. 5 Ric. II. ſt. 1. c. 7. and ſtat. 15 Ric. II. c. 2. Vid. ant. 261.

commiſſion

commiſſion would impriſon in their caſtle thoſe whom they wiſhed to oppreſs, till they made fine for their deliverance. It was for this reaſon ordained by ſtat. 5 Hen. IV. c. 10. that none ſhould be impriſoned by juſtices of the peace but only in the common gaol, with a ſaving to ſuch lords as had franchiſes.

Statutes of Henry V.

We ſhall conſider the ſtatutes of Henry V. in the like order as thoſe of the foregoing kings. The ſtatutes hitherto mentioned concerning the repreſentatives of the people, related to the mode of election. The firſt act in this king's reign is to aſcertain the qualifications of the *electors* and perſon to be *elected*. Knights of the ſhire, ſays the act, ſhall not be choſen unleſs they are reſident within the ſhire the day of the date of the writ of ſummons; and the knights, eſquires, and others, who are to be chooſers of the knights of ſhires are to be reſident within the ſhire in the manner and form aforeſaid. Again, citizens and burgeſſes of cities and boroughs are to be citizens and burgeſſes reſident dwelling, and free in the ſame, and no other perſon nor in any other manner whatever. Theſe ſtatutes, and others relating to the election of the commons, are only mentioned incidentally, they not properly making a part of our ſubject. It has been ſtudiouſly endeavoured all through this Hiſtory, to avoid the diſcuſſion of conſtitutional queſtions, and to confine our deduction wholly to the changes that have happened in that part of our law by which private property and the private rights of individuals are governed, and that by which public injuries are puniſhed.

The clergy.

We have ſeen, that in the laſt reign vicars were eſtabliſhed in poſſeſſion of their benefices; we now find an act for limiting the ſalaries of curates and chaplains; the former were to have eight, and the latter but ſeven marks per ann. *(a)* The ſubject of proviſors, and the poſſeſſion of eccleſiaſtical benefices by aliens, occaſioned ſeveral acts in this reign. The ſtat. 13 Ric. II. c. 3. prohibiting *Frenchmen* from holding church benefices, was enforced by ſtat. 1 Hen. V. c. 7. with an exception of priors alien conventual, and other priors having inſtitution and induction, ſo as they were catholic, and found ſurety not to diſcloſe the ſecrets of the realm. The penalties of a *præmunire* were inflicted by ſtat. 3 Hen. V. c. 4. on perſons obtaining proviſions, licences, or pardons, againſt the ſtatute 7 Hen. IV. c. 8. The ſame jealouſy which had been long entertained of foreign churchmen in this kingdom, was ſhewn by the Iriſh parliament in the laſt reign; when they paſſed an act pro-

(*a*) Stat. 2 Hen. V. ſt. 2. c. 2.

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hibiting the Iriſh people from accepting any church benefice whatever: by the *Iriſh* were meant, thoſe original inhabitants of the country who had almoſt always been in a ſtate of reſiſtance to the Engliſh ſettlers. This act of the Iriſh parliament was now confirmed by the ſtat. 4 Hen. V. c. 6.; and further, if any archbiſhop, biſhop, abbot, or prior of the Iriſh nation made any collation or preſentment contrary to that act, or brought with them, as ſervants, any Iriſh rebels to parliament, to learn and diſcover the ſecrets and ſtate of the Engliſh, it was ordained, that their temporalties ſhould be ſeiſed into the king's hands till they had made fine to the king.

Fees for the probate of teſtaments were ſettled by ſtat. 4 Hen. V. c. 8. By another act, the ordinary was empowered to inquire into the government of hoſpitals; and if they were of the king's foundation, he was to certify the ſtate of them to the chancery; if of another's foundation and patronage, then he was to make correction and reformation according to the laws of holy church *(a)*.

Complaint had been made to parliament, that perſons were ſued in the eccleſiaſtical court, as well for matters touching freehold, debt, treſpaſſes, covenants, and other things (the cogniſance of which belonged to the king's court), as on queſtions matrimonial and teſtamentary; and when a perſon appeared upon citation, and demanded a libel, in order to be informed what he was to anſwer, or purchaſed a writ of prohibition, the libel uſed to be denied. That perſons might not, in this manner, be deprived of their remedies at common law, it was enacted by ſtat. 2 Hen. V. ſt. 1. c. 3. that the libel ſhould be delivered to the party, without difficulty, at the time when by law it was grantable.

Some amendments were made in the courſe of proceſs and proceeding. We have ſeen what remedy was given by ſtatute in the time of Edward III. for perſons whoſe goods were ſeiſed by the ſheriff, who had miſtaken the perſon of an outlaw *(b)*. The great uſe of the writ *de idemptitate nominis* was to aſcertain whether the perſon ſo injured was the party really meant by the exigent. To make this proceſs more accurate and certain, it was prayed in the laſt reign, that no man might be outlawed without his ſurname, and the name of his town and county *(c)*. At length a ſtatute was paſſed to aſcertain this matter, and it was enacted by ſtat. 1 Hen. V. c. 5. that in every original writ of actions perſonal, appeals, and indictments, and

(a) Stat. 2 Hen. V. ſt. 1. c. 1. *(b)* Vid. ant. 29. *(c)* Cott. Abri. p. 422. § 83.

in

in which the exigent ſhall be awarded, in the names of the defendants, *additions* ſhould be made of their eſtate, or degree, or myſtery, and of the towns, or hamlets, or places and counties of which they *were*, or *be*, or in which they be or were converſant, otherwiſe the outlawry to be void; and before the outlawry pronounced, the writ and indictment may be abated by exception of the party. It was alſo provided, that though the writs of additions perſonal were not according to the records and deeds, if ſuch addition was ſurpluſage, the writ ſhould not be abated on that account. The clerks of the chancery, if they left out ſuch additions, were to be puniſhed, by fine, at the diſcretion of the chancellor. This ſtatute *of additions*, as it was afterwards called, removed thoſe inconveniences that uſed to be occaſioned by the want of naming particularly the parties in a writ.

The ſtatute of additions

A STATUTE of *jeofail and amendment* was made, in order to remove ſome doubts which had ariſen upon ſtat. 14 Ed. III. ſt. 1. c. 6. It was ordained by ſtat. 9 Hen. V. c. 4. that the juſtices before whom ſuch plea or record was made or was depending, ſhould have power and authority, as well by adjournment as by way of error, or otherwiſe, to amend ſuch record and proceſs, according to the permiſſion of the former ſtatute, as well *after* judgment as *before*, ſo long as the record was before them. Thus this act did no more than extend the powers of the ſtatute of Edward III. by allowing ſuch amendments to be made *after* judgment. In the ſecond year of the king, a ſtatute had been paſſed to ſecure plaintiffs in the full fruits of a judgment obtained. It had been common for defendants in cuſtody on execution, to ſue out a *certiorari* or *corpus cum cauſâ*, and when brought before the chancellor, they would be diſcharged upon bail or mainpriſe, and ſometimes without either, againſt the will of the plaintiffs, who were thus defeated of their judgments: to prevent this, it was enacted by ſtat. 2 Hen. V. ſt. 1. c. 2. that if upon ſuch writs it was returned, that the perſon was a priſoner on a judgment, he ſhould be remanded immediately, and there remain without bail or mainpriſe till he had agreed with his plaintiff.

and amendment.

ANOTHER regulation was made by ſtat. 2 Hen. V. ſt. 2. c. 2. concerning the qualifications of jurors. The ſtatute complains, that many were diſinherited, becauſe the perſons who paſſed in inqueſts were "common jurors, "and others that have but little to live on but by ſuch inqueſts, and no-"thing to loſe on account of their falſe oaths, whereby they offend their con-"ſciences the more largely:" it was therefore now provided, that none ſhould be admitted to paſs on inqueſts upon the trial of the death of a man, nor

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between party and party in pleas real, nor in a plea perſonal, where the debt or damage declared for amounted to forty marks, unleſs he had lands or tenements of the yearly value of forty ſhillings above all charges; and if he had it not, it was a cauſe for which either party might challenge him. Becauſe the under-officers of ſheriffs were continually remaining in their offices, it was found no eaſy matter for an injured perſon to obtain redreſs againſt them: it was therefore enacted by ſtat. 1 Hen. V. c. 4. that thoſe who were bailiffs of ſheriffs in one year, ſhould not be in office for the three years next following, except bailiffs of ſheriffs inheritable in their ſheriffwicks; nor was any under-ſheriff, ſheriff's clerk, receiver, or ſheriff's bailiff, to be attorney in the king's courts during the time he was in office with ſuch ſheriff. By ſtat. 9 Hen. V. c. 5. the ſtat. 14 Ed. III. ſt. 1. c. 7. concerning the appointment of ſheriffs was diſpenſed with for a time; and the reaſon given was, that the late peſtilences and wars had not left in the country ſufficient perſons of ſubſtance to anſwer the requiſites of that act; therefore the king was authorized, during four years, to appoint ſheriffs and eſcheators at his pleaſure.

THE whole ſecular power ſeems, at the beginning of this reign, to have been made ſubſervient to the ends of the prelates in ſuppreſſing the Lollards.

Heretics.

It was enacted by ſtat. 2 Hen. V. ſt. 1. c. 7. that the chancellor, treaſurer, juſtices of both benches and of the peace, ſheriffs, mayors, and bailiffs of cities and towns, and all other chief officers of places, ſhould upon entering into their office take an oath, to uſe their whole power and diligence to deſtroy all hereſies and errors, commonly called *Lollardies*, and aſſiſt the ordinaries and their commiſſaries as often as required by them, ſo as they paid their expences of travelling: however, they were enjoined by the act not to poſtpone the king's ſervice to that of the church. Beſides the penalties Lollards were before liable to, they were now to ſuffer forfeiture of goods and lands, as in caſe of felony; only the lands ſuch convicts held of the ordinary or his commiſſary before whom he was convict, were to be forfeit to the king; but no heretics thus left to the ſecular arm were to forfeit their goods till they were dead; in which particular this new proviſion did not conform to the law of forfeiture for felony. The juſtices of the king's bench, of the peace, and of aſſiſe, were empowered to *enquire* (that is, take indictments) of Lollards and their maintainers, and award proceſs; but becauſe hereſy was a ſpiritual offence, they were to deliver the party, when taken, to the ordinary by indenture, within ten days after the arreſt, to be tried by the laws of holy church. The indictment was not to be uſed as evidence, but only for information before the ſpiritual judge, who was

to

to commence his proceſs as if no indictment had been found. This was the famous act againſt the Lollards, upon which many of thoſe people ſuffered. In the preamble they are loaded with the imputation of ſtate crimes, as a pretence to delude the people into a concurrence with the church-men in their perſecution; they are ſaid to be confederacies to deſtroy the king, and all other eſtates of the realm, both lay and ſpiritual, *and all manner of policy, and finally the laws of the land:* ſo ſenſible were they that the charge alone of difference in religious opinions could not juſtify to the people ſuch ſanguinary proceedings.

Some ſtatutes were made relating to the coin. It was made felony by ſtat. 3 Hen. V. ſt. 1. c. 1. to make, buy, or import, certain coin then prohibited by proclamation, called *gally halfpence, ſuſkins,* and *dodkins*; and the payments in theſe coins ſubjected the party to certain penalties. Much doubt had ariſen, whether clipping, waſhing, and filing, was an offence within the ſtatute of treaſons; and it was accordingly ſo declared to be, by ſtat. 3 Hen. V. ſt. 2. c. 6. and cogniſance thereof, and of every other falſity of money, was given to the juſtices of aſſiſe: the juſtices of the peace, likewiſe, might ſtill enquire thereof; that is, take indictments and iſſue proceſs of *capias*, but no farther. The ſuſpicions entertained of the treaſonable practices of the Welch ſtill continued; and it was enacted by ſtat. 3 Hen. V. ſt. 2. c. 3. that all ſuch Britons dwelling in the queen's houſe, and others abiding near the houſe, and elſewhere, not made denizens, ſhould be voided out of the realm, by a certain day, under pain of felony. And becauſe many *Welch* made inroads into Shropſhire, Hereford, and Glouceſterſhire, and took away people by force, the juſtices of the peace were authorized by ſtat. 2 Hen. V. ſt. 2. c. 5. to enquire, hear, and determine ſuch offences, award proceſs of outlawry, and certify this to the lords of ſeignories where ſuch plunderers harboured, who were to order execution to be done thereof. By another ſtatute it was ordained (*a*), that all Iriſhmen and Iriſh clerks-beggars, called *chamber-deacons*, ſhould be voided out of the realm by a certain time, on pain of loſing their goods, and being impriſoned at the king's pleaſure; excepting graduates in the ſchools, ſerjeants and apprentices of the law, thoſe who were inheritors in England, religious perſons profeſſed, merchants of good fame and their apprentices, and thoſe with whom the king would diſpenſe. All Iriſhmen having eſtates and benefices were to dwell

(*a*) Stat. 1 Hen. V. c. 8.

on

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on them. This act is ſtated to be made for the quiet and peace of England, and the increaſe and reſtoring of Ireland.

Forging deeds.

THE law reſpecting forgery, as ſtated by our old writers, ſeems to have become obſolete, as a ſtatute was now made, impoſing a leſs penalty than the old law, and yet adding ſomething to the then exiſting law. It is ſaid by ſtat. 1 Hen. V. c. 3. that people poſſeſſed of lands or tenements ſuffered loſſes, becauſe perſons *ſubtilly imagined and forged anew divers falſe deeds and muniments, to trouble and charge their lands:* It was enacted, that a perſon ſo injured ſhould have recovery of his damages againſt the party making or publiſhing, who was alſo to make fine at the king's pleaſure. This was ſubſtituting a civil in the place of a criminal proceeding.

SEVERAL laws were paſſed to facilitate the execution of proceſs againſt offenders living in places where the king's writ did not run. Becauſe felons living in *Tyndal* and *Hexham* eſcaped the proceſs of the law, which could not be executed in thoſe franchiſes, it was provided *(a)*, that proceſs ſhould be made at common law, till they were outlawed; and when that was pronounced and returned before the juſtices, they were to certify it to the miniſters of thoſe franchiſes, who were immediately to ſeize the lands, goods, and perſons of the offenders. This ſtatute was afterwards extended to perſons living in *Rideſdale*, another franchiſe *(b)*. It was likewiſe provided *(c)*, that perſons outlawed in the county of Lancaſter ſhould not forfeit their lands or goods in other counties.

RESPECTING offenders in general who abſconded to avoid the proceſs of the law, it was enacted by ſtat. 2 Hen. V. ſt. 1. c. 9. that where murder, manſlaughter, robbery, battery, aſſemblies of people in great numbers, riots, and inſurrections, happened, and the offenders fled, and any one came to the chancery to complain thereof, a bill ſhould be thereupon made; and the chancellor, after the bill to him delivered, if he was informed of the truth thereof, ſhould have power to make a writ of *capias* at the king's ſuit, into the county where the offence was, returnable in chancery at a certain day. If the party was taken, or ſurrendered, he was to be put in ward, or mainpriſe, as the chancellor pleaſed: if not, and the ſheriff returned that he could not be taken, then the chancellor was to make a writ of proclamation directed to the ſheriff, returnable in the king's-bench at a certain day, to make proclamation in two counties, for him to appear at the day, or ſtand

(a) Stat. 2 Hen. V. ſt. 1. c. 5. *(b)* Stat. 9 Hen. V. c. 7. *(c)* Stat. 9 Hen. V. c. 2.

convicted

convicted of the offence charged in the bill, the ſubſtance of which was to be contained in the proclamation; and if they came not by the return of the proclamation, they were to ſtand attainted. If the offence was a riot, the ſuggeſtion thereof was to be teſtified to the chancellor by letters under the ſeal of two juſtices of the peace and the ſheriff, before the *capias* was to iſſue. If the fact happened in the county of *Lancaſter*, or other franchiſe, where there was a chancellor and a ſeal, the chancellor was to write to the chancellor thereof all the ſuggeſtions in the aforeſaid bill, commanding him to make execution in the above way.

Riots.

In the preceding chapter of the ſame ſtatute a very ſpecial courſe was directed in caſe of *riots*. It was found, that the perſons intruſted with the execution of ſtat. 13 Hen. IV. c. 7. concerning riots, were dilatory and negligent therein: it was now enacted, that, ſhould default be found in the two juſtices of peace, or juſtices of aſſiſe, and the ſheriff and under-ſheriff, then there ſhould iſſue, at the inſtance of the party grieved, under the great ſeal, a commiſſion, to enquire as well of the truth of the caſe and the original mattter, as of the default of the juſtices and ſheriff, to be directed to ſufficient and indifferent perſons at the nomination of the chancellor; which commiſſioners were to return preſently into the chancery the inqueſts and matters found before them. The pannel was to be returned by the coroner, and the jurors to have lands of 10l. per ann. with ſevere iſſues and penalties on default. The chancellor was, moreover, when he had knowledge of any riot, to ſend a writ to the juſtices and ſheriff, enjoining them to put the above ſtatute of Henry IV. in execution: and the juſtices were to be paid by the ſheriff the coſts of ſuppreſſing ſuch riots. Perſons attainted of heinous riots were to be impriſoned for a year at leaſt, without bail or mainpriſe; thoſe attainted of petty riots, to be impriſoned as it ſhould ſeem beſt to the king. All perſons were to be aſſiſting to the juſtices and commiſſioners, on pain of impriſonment and fine.

Because indictments in the county of Lancaſter ſometimes charged offences to be committed in places that did not exiſt, it was provided by ſtat. 7 Hen. V. that the juſtices ſhould, before the exigent on ſuch indictment was awarded, inquire *ex officio* whether there was ſuch a place; and if there was found to be no ſuch place, the indictment was to be void, and the indictors puniſhed by impriſonment and fine *(a)*. It was at the ſame time

(*a*) Becauſe this ſtatute was ſuppoſed not to be in force, it was re-enacted by ſtat. 18 Hen. VI. c. 12.

declared,

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declared, that proceſs of *capias* and exigent, as in treſpaſs, ſhould lie againſt the forgers of falſe deeds.

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THE authority of juſtices of the peace was further eſtabliſhed by ſeveral acts. Juſtices were empowered by ſtat. 2 Hen. V. ſt. 1. c. 4. to ſend their writs to take fugitive labourers in any county. All the ſtatutes of labourers were to be exemplified under the great ſeal; the exemplification was to be ſent to every ſheriff, to make proclamation in full county, and deliver it to the juſtices of the peace named of the *quorum*, to remain with them for the better execution thereof. It was further directed, that juſtices of the *quorum* ſhould be reſident within the county, except lords, juſtices of the two benches, the chief baron, ſerjeants at law, and the king's attorney; and that they ſhould hold their ſeſſions four times a-year; namely, in the firſt week after St. Michael, the Epiphany, the clauſe of Eaſter, and the tranſlation of St. Thomas the Apoſtle; and the juſtices were to hold their ſeſſions throughout the realm in the ſame week every year. Juſtices were authorized by this act to examine labourers, ſervants, and artificers, with their maſters, upon their oaths. Again, by ſtat. 2 Hen. V. ſt. 2. c. 1. juſtices of the peace were to be of the moſt ſufficient perſons dwelling in the county, except lords, and juſtices of aſſiſe, and were to be named by the advice of the chancellor and king's council.

Truce and ſafe-conduct.

WE muſt rank among the penal acts of this reign a ſtatute made in aid of the law of nations, to puniſh the breach of *truce and ſafe-conduct*. This was ſtat. 2 Hen. V. ſt. 1. c. 6. It complains, that during the continuance of a truce, many people having the king's ſafe-conduct had been ſlain, robbed and ſpoiled by the king's ſubjects, as well upon the main ſea as within the ports and coaſts of England, Ireland, and Wales; and ſuch ſpoilers were abetted and received, to the breach of truces and ſafe-conducts, and the diſhonour of the kingdom. It was now declared, that ſuch manſlaughter, robbery, ſpoiling, breaking of truce and ſafe-conduct, and voluntary receipt, abetment, procurement, concealing, hiring, ſuſtaining of them as well by land as by ſea ſhould be adjudged high treaſon. And the king was to aſſign by letters patent, in every port, a perſon to be called *a conſervator of the truce and the king's ſafe-conduct*, who was to have power by ſuch patent, and alſo by commiſſion of the admiral, to inquire of all ſuch treaſons and offences upon the main ſea out of the body of the counties, and out of the franchiſes of the *cinque* ports, and to puniſh all thoſe indicted before him, at the king's ſuit, or that of the party, by ſuch proceſs, examination, proof, determination, judgment and execution, as the admiral might have done, ſaving the

determination

determination upon the death of a man, which was to be reſerved to the admiral. Upon land, within the body of a county, he was to inquire of all the above offences, as well within liberties as without, and to make proceſs by *capias* and *exigent*. Two perſons learned in the law were to be aſſociate in every commiſſion made to ſuch conſervator, and they together were to make deliverances of gaols, according to the law of the land. The act contains ſome other particulars of leſs importance. Thus far of the ſtatute-law in the reigns of Richard II. Henry IV. and Henry V. We now proceed to the deciſions of courts.

DURING the reigns of theſe three kings, actions upon the caſe had grown very common. We find this action brought—for diſturbing a way—againſt an oſtler for horſes loſt—for negligently keeping fire and burning the plaintiff's houſe—for not infeoffing after promiſe—for not doing ſuit—for ſelling bad wine—for not repairing banks—for enticing away a ſervant—for keeping a ſchool near an ancient one—and the like *(a)*.

Actions upon the caſe.

IF theſe writs of treſpaſs were now applied to a variety of new caſes, they were likewiſe more nicely conſidered, and their peculiarities better underſtood. In the reign of Henry IV. we find the term of *treſpaſs ſur le caſe* become common, and in familiar uſe *(b)*; before, they were more uſually called actions of treſpaſs ſimply; but they now began to ſettle the marks of diſcrimination between *treſpaſs* and *treſpaſs upon the caſe*. It was held, that the former muſt always be *vi et armis*, the latter never. However, the nature of injuries is often ſo complex, and their conſequences ſo various, that the truth of a matter which ſounded in caſe, could not be properly ſet forth without ſometimes alledging circumſtances which carried evident *force* in them: therefore, in 12 Hen. IV. where an action on the caſe was brought for ſtopping a ſewer, ſo as ſeveral acres of ground were flooded, it was held good that the ſtopping the ſewer was laid *vi et armis*, that being a malfeaſance, and the remote cauſe of the injury ſuſtained by the plaintiff; though the conſequential damage, which was the immediate cauſe, and the git of the action, was in caſe *(c)*; a diſtinction which was ſome years after re-conſidered and allowed. It was then laid down, that the *cauſa cauſans* (as they called it) might be forcible, as in this inſtance of ſtopping the ſewer, and be laid *vi et armis* even in an action upon the caſe, though that action is properly grounded upon the *conſequence*

(a) Henry IV. V. paſſim. *(b)* 7 Hen. IV. 14. b. *(c)* 12 Hen. IV. 3.

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of that ſtoppage; and this conſequence they diſtinguiſhed by the appellation of *cauſa cauſata* (*a*).

THIS was the manner in which they refined on this new action. It was in its conception ſo near of kin to the action of treſpaſs, that it required no ſmall degree of ſagacity to perceive the inſtances in which the old form failed, and it was neceſſary to make a ſpecial writ. The caſes in the reign of Edward III. and thoſe in this period, which we have hitherto conſidered, are founded upon *malfeaſances*, or ſuch inſtances of *neglect* as were in the nature of a malfeaſance; both which were ſo much *in the like caſe* (according to the requiſition of the ſtatute of Weſtminſter) with the old writ of treſpaſs, that the admiſſion of them was obvious and eaſy.

Of aſſumpſits.

BUT the action upon the caſe was found ſo convenient a remedy, that it was wiſhed to extend it ſtill further. They wanted to apply it to caſes of *non-performance of promiſes*; but theſe did not ſo kindly fall within the analogy of former inſtances: it was thought ſomewhat harſh to give at any rate the name of treſpaſs to a thing which was never *done*; it took therefore ſome time, and needed the concurrent force of ſome ſtrong motives to induce the courts to admit theſe new writs. The preſent ſtate of the remedies in uſe, where contracts were not performed, operated, very probably, towards gaining a ſupport for theſe new actions upon the caſe. If a man performed not his covenant, an action of covenant lay; but it had been long held, that an action of covenant muſt be grounded on a ſpecialty; ſo that where the parties had not ſo bound themſelves, that remedy failed. If a man did not pay money which he owed, the remedy was by action of debt; in which the defendant might diſcharge himſelf by wager of law, unleſs the demand was founded upon a ſpecialty: the ſame in detinue, which indeed was only another form of the action of debt. To obviate theſe and the like defects, and to legitimate an action of a more effectual nature in matters of contract, was worth the attempt. Several actions of this kind were brought into court, before they were allowed and authenticated by a judicial deciſion in their favour.

THE firſt caſe of this kind, upon record, was in 2 Henry IV. It was an action againſt a carpenter: *Quare cum*, &c. *aſſumpſiſſet*, &c. to build a houſe within a certain time, he had not done it. It was objected, that this was in covenant; and as no writing was ſhewn, the action muſt fail: to which *Brian* aſſented, but at the ſame time conceded, that perhaps if the writ had ſaid

(*a*) Co. Rep.

that

that *the work had been begun*, and had afterwards *through negligence* been ſtopped, &c. it might be otherwiſe (hereby adhering to former determinations reſpecting *malfeaſances* and caſes of *negligence*): but he pronounced this remedy inadequate where the contract was *executory*, and the only complaint againſt the defendant would be for his *non-feaſance* or *non-performance*. The cauſe was diſmiſſed on the above objection (*a*). In the 11th of the ſame king there was exactly the ſame caſe before the court: the ſame objections were raiſed, the ſame conceſſion was made, but in plainer terms; and the cauſe was diſmiſſed on the ſame grounds as the former (*b*): thus the court ſeemed to have determined againſt the very conception of this kind of action. It is remarked upon this caſe by an author of later times (*c*), that there was no conſideration alledged; that it was *nudum pactum*, and therefore the action could not lie; which it cannot be denied may be an additional objection, but it was not taken at the time, and the cauſe appears by the report to have been diſmiſſed both times upon the ſame defects; the want of a written covenant; *and* the prevailing opinion, which confined theſe actions to inſtances of malfeaſance and negligence, that is, where the defendant had really *done* ſomething.

It muſt be obſerved of theſe determinations, that they left all perſons who had made agreements without deed (for, if a mere writing, it could not be declared on in covenant), and where nothing had been done to execute the contract, entirely without redreſs. It is not improbable, that the repeated deciſion of this point might have driven parties ſo circumſtanced into chancery, where they could have theſe agreements decreed to be ſpecifically performed. Perhaps this, as well as other conſiderations, might incline the courts to review this grand point, and try if they could accommodate the notions of law, as then underſtood, to the exigency of the occaſion; and thereby not only draw back into its proper channel the current of deciſion from the chancery to the courts of common law; but, by rendering this action more general, put the nation in poſſeſſion of what was then much wanted, a more effectual common-law redreſs in matters of contract. This was not done till ſome years after.

The criminal law.

The violence with which criminal proceedings were managed in the firſt of theſe three reigns has been already ſeen. This and the like irregularities are rather to be attributed to the fury of party, than ſtated as inſtances of

(*a*) 2 Hen. IV. 3. b. (*b*) 11 Hen. IV. 33. (*c*) Bro. Act. ſur Caſe, 40.

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what was conſidered by lawyers to be the law of the land. The criminal law, as practiſed in the reigns of Richard II. Henry IV. and Henry V. was in general governed by the ſame principles and rules as in the reign of Edward III.

Some few points are now to be met with in the books which did not before occur, and others that ſomewhat deviate from the more ancient practice: of the former ſort is the account given in the firſt year of Henry IV. of the trial of a peer. In all caſes of life and limb, the lords poſſeſſed a judicature, by which every peer had, according to *Magna Charta*, a right to be tried. In this capacity the lords acted as judges, and ſat as in a court, being bound to hear and determine according to the rules of the common-law. This judicial character, it ſhould ſeem, was ſupported with more ſcruple, and with a cloſer attention to legal formalities, than their parliamentary one, where they often decided on the lives of men without any evidence of guilt, or even the pretence of a trial. The proceedings on the trial of a peer are thus related in a caſe that happened in the beginning of the reign of Henry IV. An indictment of treaſon had been found againſt a peer, under a commiſſion directed to the mayor and others for that purpoſe: after this the king granted a commiſſion to an earl, reciting the above facts, and that the place of ſteward of England was vacant, and thereby appointing him to that office, to do right to the lord indicted, commanding all lords to attend, and the conſtable of the Tower to bring his priſoner before him. The trial was held in Weſtminſter hall, where the ſteward ſat under a cloth of ſtate, the lords ſitting down the hall on each ſide, and the judges round a table in the middle. The juſtices then delivered in the indictment; which on that occaſion was confeſſed by the defendant, and judgment accordingly given: but, ſays the book, if it had been denied, the ſteward was to begin with the loweſt lord, and aſk all their opinions *upon their conſcience*, without adminiſtering an oath (*a*).

We find the penance to which priſoners were ſubjected, if they refuſed to plead, inflicted now in a different manner from what it was ſtated to be by Fleta and Britton (*b*). They were now to be put *en diverſes meaſons baſes et eſtoppes, que ils giſent par la terre touts nuds forſque leur braces, que il mettroit ſur chacun deux tant de fer et poids quils puiſſent porter, et plus, iſſint quils ne puiſſent lever, et quils naver aſcun manger, ne boire, ſi non le plus pier pain quil puiſſent trouver, et de leau plus pres al gaole (excepte eau courant) et que le jour quils ont*

(*a*) 1 Hen. IV. 8. (*b*) Part I. 390.

pain

pain quil nayent de leau, et e contra, et quils GISENT ISSINT, TANTQU'ILS FURENT MORTS (*a*). Thus we ſee they were to lie under a *peine* (for ſo it was now called inſtead of *priſone*, which is the word in the ſtatute) *till they were dead*, which was ſoon likely to follow from the account here given of the weights to be placed upon them. By what authority this proceeding was altered between the time of Fleta and the reign of Henry IV. can only be determined by conjecture. It is probable, ſo material a change in judicial proceedings as one which affected life, would not have been hazarded without the ſanction of the executive power at leaſt, if not of the parliament; but no mention is to be found of any ſuch order or direction. In later times we find (*b*) a further alteration in the mode of compelling priſoners to ſtand a trial; and if an authority had been given by parliament or the council for this ſecond change, it is leſs likely that no trace of it ſhould be left, as it muſt have been given ſince the reign of Henry IV. when public memorials have been kept with more ſecurity than in earlier times. Whatever was the authority for the firſt change, the motive to it has been thus accounted for: It has been thought to ariſe from the juſtices in eyre and juſtices of gaol-delivery not ſtaying above two or three days in a county-town, who therefore could not wait for the tedious method, before uſed, of forcing the criminal to plead, as it laſted ſometimes forty days (*c*). The probability and juſtneſs of this conjecture muſt be determined by the reader.

THE law is not much indebted to either of theſe three kings. It is ſaid to have been the inclination of Richard and ſome of his favourites, to countenance the incroachments of the civil law; tho' this, probably, went no further than a partiality for ſuch parts of it as favoured high ſovereign authority. It does not appear that our juriſprudence was under any obligation to his two ſucceſſors, except that no prejudices were entertained againſt it. The law in general was ſuffered to take its courſe. If it was ever turned from its proper direction, it was, when the controuling power for a time conſtrained every thing to ſubmit to the neceſſity of the occaſion, and made uſe of this as an inſtrument more effectual, perhaps, than open violence. The king and government.

IN the reign of Richard II. when the ſovereign authority often changed hands, while the nation was governed at one time by the king, at another

(*a*) 8 Hen. IV. 1. (*b*) At Cambridge 1741. (*c*) Barr. Stat. p. 86.

by

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by an authority delegated to certain lords, and, in the mean time, animoſities were carried to the greateſt lengths between the barons; it is not to be wondered that the law was occaſionally made ſubſervient to the reigning powers, and taught to ſpeak that language which would confirm their intereſts, and deſtroy all thoſe who oppoſed them. Moſt of the extravagancies which aroſe from this ſtate of things, conſiſted in judgments of treaſon, and attainders of obnoxious perſons without due examination or trial.

It was in this ſpirit, that conſpiring the death of the dukes of Lancaſter and Glouceſter, the king's uncles, was in 17 Ric. II. declared by the king and lords to be high treaſon *(a)*; that Sir Thomas Haxey was condemned to die the death of a traitor, for having moved in the houſe of commons, that œconomy might be promoted at court, in order to which he propoſed that the court ſhould not be ſo much frequented by *biſhops* and *ladies (b)*. Of the like kind was the proſecution before the committee of parliament, againſt *Henry Bowet*, attorney to the duke of Hereford, who having ſolicited for the duke concerning the poſſeſſion of his father's eſtate, was adjudged a traitor; but the puniſhment of death was changed to baniſhment *(c)*. Theſe and the like abuſes of law and juſtice muſt be aſcribed to the violence of the times.

In the 6th of Henry IV. that monarch did not ſcruple to proceed againſt the archbiſhop of York for rebellion and treaſon. Sir William Gaſcoigne, the chief-juſtice, having ſome doubt about acting in ſo hazardous an enterprize, the king appointed Sir William Fulthorpe for judge, who pronounced ſentence of death, which was followed by immediate execution. This ſeems to have been without the formality of a trial, and is the firſt inſtance, in this country, of a capital puniſhment inflicted on an archbiſhop. The earl of Nottingham was condemned in a like ſummary manner. In the reign of Henry V. the earl of Cambridge, ſome other lords, and Sir Thomas Grey, were indicted by a jury of commoners, of high treaſon. The evidence upon the indictment was, that the conſtable of Southampton-caſtle had ſworn, that they had ſeparately confeſſed their guilt to him. Upon this evidence Sir Thomas Grey was executed. But the lords pleading their privilege, the king thought proper to ſummon eighteen barons, with the duke of Clarence as their preſident, to try them. The evidence given to the jury had been put into writing, and was now read to the lords: it does not appear that the pri-

(*a*) Cotton's Abrid. 354. (*b*) Cotton 362. (*c*) 3 Tyrr. 991.

ſoners

ſoners were even produced in court; but they were in this manner convicted and executed (*a*).

THE helps to the knowledge of the law during this period are the *ſtatutes* and *reports*.

The ſtatutes.

SEVERAL ſtatutes were made in the reign of Richard II. without the aſſent of the commons; but they had acquired during that reign an aſcendancy which gave them importance; and in the 1ſt of Henry IV. tho' foiled in their attempt to ſhare in the judicial department of the lords, they drew from that houſe, as we have ſeen, an expreſs reſolution that they had a legiſlative authority in all ſtatutes, grants, and ſubſidies (*b*). This was a declaration expreſsly in favour of their right. However, it was ſo little regarded in practice, that in the very next year it was invaded; for the famous ſtatute 2 Hen. IV. c. 15. againſt Lollards, was paſſed without the aſſent of the commons, who are ſaid to have expreſsly diſavowed it (*c*). Notwithſtanding, this act has always been held to be an act of parliament, and was enforced, till repealed in the reign of Henry VIII. and, after being revived in the reign of Philip and Mary, till it was finally repealed in the reign of queen Elizabeth.

INSTANCES like this produced the petition in 8th of Henry IV. in conſequence of which it was enacted, at the requeſt of the commons, that certain of the commons' houſe ſhould be preſent at the ingroſſing of the parliament-roll. The grievance complained of was not remedied entirely by this precaution. It had got into practice, upon entering the bill on the ſtatute-roll, to make additions, diminutions, and alterations, whereby the act was made to vary, and that ſometimes materially, from the ſubſtance of the commons' petition; and they were not unfrequently drawn up directly contrary to their ſenſe and intention (*d*). A practice like this required redreſs. The commons remonſtrated in 2 Hen. V. that, as they were as well *aſſentors* as petitioners, ſtatutes ſhould be made according to the tenor of the writing of their petition, and not altered.

Reports.

THERE is no year-book of the reign of Richard II. in print. But Sir Matthew Hale ſays, he had ſeen the entire years and terms of this king in manuſcript (*e*). There are ſome caſes of this reign to be found in *Jenkins*'s Centuries, ſome in *Keilway*, ſome in *Benloe*, and ſome in *Fitzherbert*'s Abridge-

(*a*) 3 Hum. 97. (*b*) Vid. ant. 277. (*c*) 4 Inſt. (*d*) Vid. Cotton. Table, Statutes, &c.
(*e*) Hiſt. Com. Law, 175.

ment.

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ment. All theſe ſcattered notes have been collected by *Bellewe*, and digeſted under heads; making a ſort of ſubſtitute for a year-book of this king. Through the reigns of Henry IV. and Henry V. the year-books are complete: and many caſes are likewiſe to be found in *Jenkins* and *Benloe*. The year-books of Henry IV. and V. as they contain matter that bears a nearer affinity to the ſtate of our laws at this day than the books of Edward III. are more likely to engage the attention of a modern reader. Their form is leſs irkſome, and the ſubject more intelligible; they have leſs the ſtyle of an entry than the old reports, and give a ſtate of the caſe, and what was ſaid upon it, more in the way of a narrative. Notwithſtanding theſe advantages in their favour, it is the opinion of a learned writer (*a*), that the reports of theſe two reigns do not arrive, either in the nature of the learning contained in them, or in the judiciouſneſs and knowledge of the judges and pleaders, or in any other reſpect, to the perfection of the laſt twelve years of Edward III

(*a*) Hal. Hiſt. 175.

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HENRY VI. EDWARD IV. EDWARD V. RICHARD III.

Statutes of Henry VI.—Members of Parliament—Of the Council and Chancery—Statutes of Pernors of Profits—Attaints—Writs of Proclamation—Statutes of Jeofail—Juries—Sheriffs, and Execution of Proceſs—Attornies—Treaſon to burn Houſes—Proceſs in criminal Cauſes—Forcible Entries—Statutes of Edward IV.—The Juriſdiction of the Tourn reſtrained—Statutes of Richard III.—Ceſtui que Uſe to make Eſtates—Benevolences aboliſhed—Letting priſoners to Bail—Fines.

THE parliament during theſe reigns was rather employed in furthering and improving the policy of ſome ſtatutes made in the preceding period, than in introducing any novelties; ſo that the ſtatutes of theſe kings are not very intereſting or important. But the deciſions of courts amply make up for this deficiency, as the Year-books of theſe reigns contain perhaps more uſeful information than all the reſt taken together. In the preſent chapter, we ſhall confine ourſelves to the former, leaving the other to be diſcuſſed afterwards.

WE ſhall arrange the ſtatutes of theſe reigns in the ſame order as has been before obſerved, beginning with thoſe of Henry VI.

Statutes of Henry VI.

THE parliament made another law to reſtrain the emigration of the Iriſh into this kingdom. It was ordained by ſtat. 1 Hen. VI. c. 3. that thoſe who did not leave the kingdom within a month after proclamation of that ſtatute, ſhould forfeit their goods, and be impriſoned at the king's pleaſure. Thoſe Iriſh who principally created ſuſpicion, were perſons beneficed there, and ſcholars reſorting to the univerſity of Oxford. No ſcholar was to enter England without a teſtimonial under the ſeal of the lieutenant or juſtices of Ireland, teſtifying that he was of the king's obedience; and if he did, he was to be deemed a rebel (*a*).

(*a*) Vid. ſtat. 2 Hen. VI. c. 8.

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THE article of *ſafe-conducts*, which had received ſome parliamentary ſanction in the laſt reign, was again conſidered by the legiſlature; and ſeveral regulations were made for the better ordering of thoſe public ſecurities (*a*). Amongſt other things, the penalty of high treaſon impoſed by ſtat. 2 Hen. V. ſt. 1. c. 6. on the violators of ſafe-conducts was repealed (*b*).

Members of parliament.

THE election and privilege of members of parliament engaged ſome of the attention of the legiſlature in this reign. The importance which the lower houſe was daily aſſuming, made it neceſſary to enlarge and adjuſt the rights they claimed individually as members.

THE firſt act concerning members of the lower houſe is ſtat. 6 Hen. VI. c. 4. and relates to their election. By ſtat. 11 Hen. IV. c. 1. the juſtices of aſſiſe had been empowered to enquire by inqueſts of office of the return of members: it was now ordained, that ſuch members and ſheriffs as had inqueſts of office found againſt them, ſhould be allowed to traverſe them, and ſhould not be damaged by ſuch inqueſt till they were duly convict. In ſtat. 8 Hen. VI. c. 1. it was complained, that as well the clergy who came to convocation, as their ſervants and familiars coming with them, were commonly arreſted and moleſted; to prevent which, it was now ordained, that they and their ſervants ſhould in future uſe and enjoy ſuch liberty or defence, in coming, tarrying, and returning, as the great men and commonalty called to parliament enjoyed. What was the privilege they enjoyed, may be partly inferred from the following caſe mentioned in the rolls of the ſame year. It is there ſaid, that a ſervant to *William Lake*, a burgeſs for London, being committed to the *Fleet* in execution for debt, was delivered by the privilege of the commons' houſe; and authority was given by the chancellor, to appoint by commiſſion certain perſons to apprehend him after the end of the parliament (*c*).

IN this ſame year we find the famous act for fixing the qualifications of the electors and elected in county elections. The reaſon for this regulation is ſtated in the preamble of the act in the following words: "Becauſe "elections of knights of ſhires have now of late been made by very great, "outrageous, and exceſſive numbers of people dwelling within the ſame "counties; of the which moſt part was of people of ſmall ſubſtance, and of "no value, whereof every of them pretended a voice equivalent, as to ſuch

(*a*) Stat. 15 Hen. VI. c. 3. Stat. 18 Hen. VI. c. 8. Stat. 20 Hen. VI. c. 1. Stat. 29 Hen. VI. c. 2. Stat. 31 Hen. VI. c. 4. (*b*) Stat. 20 Hen. VI. c. 11. (*c*) Cott. Abri. p. 596. § 57.

"elections

" elections to be made, with the moſt worthy knights and eſquires dwelling " within the ſame counties, whereby man-ſlaughters, riots, batteries, and " diviſions among the gentlemen and other people of the county ſhall very " likely ariſe, unleſs due remedy was provided." The remedy preſcribed by the ſtatute (*a*) is this: that the knights of the ſhire ſhould be choſen by people dwelling and reſident in the county, having free land or tenement to the value of forty ſhillings by the year at the leaſt, above all charges. The perſons choſen were alſo to be dwelling and reſident within the county. The ſtatute further provides, that he who had the greateſt number of thoſe who might expend forty ſhillings a-year as aforeſaid, ſhould be returned by the ſheriff, by indenture ſealed between the ſheriff and the chooſers; and the ſheriff had authority given him to examine upon the Evangeliſts every ſuch chooſer, how much he expended by the year. If the ſheriff returned any one contrary to this act, the juſtices of aſſiſe might enquire of it; and if the ſheriff was attainted thereof by inqueſt, he was to forfeit one hundred pounds to the king, and to be impriſoned for a year without bail or mainpriſe: moreover, the knights were to loſe their wages. In addition to the above affirmative deſignation of qualified voters, there was annexed, in abundant caution, this negative clauſe: that thoſe who could not expend forty ſhillings per annum as aforeſaid ſhould not be chooſers. It was further enacted, that in all writs to ſheriffs to elect knights, mention ſhould be made of this act.

It appears by the wording of this ſtatute, that the qualification of electors was narrowed, and thereby numbers of the inferior people excluded; but what was the particular deſcription of thoſe people, and what was the qualification of electors before this act, is a queſtion much agitated by writers on our conſtitution. To ſuch writers we refer the reader, this being a point not within the compaſs of a work confined to ſubjects of law only. In the 10th year of the king (*b*), this new regulation received an amendment; for, as it was not ſpecified whether the freehold ſhould be in the county where the elector dwelt, it was now declared that it ſhould. To prevent any perſonal inſult to members of either houſe, it was enacted by ſtat. 11 Hen. VI. c. 11. that if any aſſault or affray was made upon a lord ſpiritual or temporal, knight of the ſhire or burgeſs, come either to parliament or to any other council of the king, and there attending, proclamation ſhould be made for the offender to appear in the king's bench within a quarter of

(*a*) Ch. 7. (*b*) Ch. 2.

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a year; otherwiſe he ſhould ſtand attainted of the fact, and pay the party grieved his double damages (to be taxed by the juſtices or inqueſt), and ſhould likewiſe be fined to the king. The method of levying the wages of knights of the ſhire was preſcribed by ſtat. 23 Hen. VI. c. 11. They were to be aſſeſſed in the county-court, after proclamation for the attendance of the coroners and chieff conſtables; and ſevere penalties were inflicted on ſheriffs who failed in the levy or payment thereof to knights.

THE order of electing members to ſerve for counties, cities and boroughs, was re-conſidered in the 23d year of the king *(a)*; when, reference being made to ſtat. 1 Hen. V. c. 1. and ſtat. 8 Hen. 6. c. 7. it was ordained, that thoſe acts ſhould be fully obſerved. But becauſe a ſufficient penalty had not been provided, as a ſecurity for their obſervance, it was now enacted as follows: That every ſheriff, after delivery of the writ to him, ſhould make and deliver a ſufficient precept under his ſeal to every mayor and bailiff within the county, reciting the writ, and commanding him by ſuch precept to elect citizens and burgeſſes to come to parliament; which precept was to be returned to the ſheriff by indenture between them, declaring the election and the perſons choſen; and the ſheriff was to make a return thereof together with the writ. Every perſon acting contrary to this or other acts for election of members was to incur the penalty ordained by ſtat. 8 Hen. VI. and moreover pay to every perſon choſen, but not returned (or any other who would ſue in his default), 100l. with coſts, to be demanded in an action of debt, wherein no wager of law or eſſoin ſhould be allowed. Mayors and bailiffs were in the like caſe to incur the penalty of 40l. and pay in like manner 40l. to the party injured, or thoſe who ſued. A ſheriff not making due election in convenient time (that is, in full county, between the hours of eight and eleven in the forenoon), and not making a good and true return of ſuch election of knight, was to forfeit 100l. to the king and 100l. to the party ſuing: but theſe actions againſt the ſheriff by the party grieved were to be inſtituted within three months after the parliament commenced; if not, the cauſe of action would lapſe to another. At the end of this act there is a clauſe, requiring that the knights of ſhires ſhould be notable knights of the county for which they were choſen, or otherwiſe ſuch notable eſquires, gentlemen *(b)* of the ſame county, as were able to become knights, and no man of the

(*a*) Ch. 15. (*b*) *Gentils hommes del nativité.*

degree

degree of a yeoman *(a)* or under. Thus ſtood the election and qualification of members of parliament at the cloſe of this reign.

NEXT to the parliament are to be conſidered ſuch acts as pertain to certain claſſes of individuals, ſuch as ſervants, labourers, perſons exerciſing various trades, and other matters of a miſcellaneous kind.

THE policy which had been marked out by the ſtatutes of labourers paſſed in the reign of Edw. III. was ſtill purſued; and while many changes were made therein, as occaſion required, the general courſe and order of it continued the ſame *(b)*. Some immaterial alteration was alſo made in the ſtatutes of livery and maintenance *(c)*. While theſe proviſions were making for the government of the inferior orders of the people, the intereſt of trade was conſidered, and many ſtatutes paſſed to preſcribe rules and bounds to be obſerved by merchants and traders in their dealings *(d)*. The numerous proviſions made by parliament for the protection of the coin and bullion, were other inſtances of the great ſolicitude now expreſſed for the advancement of commerce *(e)*. The ſtaple of *Calais* was kept up with great ſtrictneſs *(f)*. Inſtead of any new ſtatutes againſt purveyors, thoſe already made were directed to be proclaimed in every county four times a-year *(g)*. Some acts relating to eſcheats, and other points ariſing in the management of the revenue accruing from tenures, are little worthy of notice *(h)*.

Of the council and chancery.

THERE are two ſtatutes relating to the juriſdiction of the chancery and council. The ſame jealouſy was entertained of the new juriſdiction exerciſed by the firſt of theſe courts, as formerly. In the 2d year of the king we find a petition to parliament, praying that no man be bound to anſwer in the chancery for a matter determinable at common law, under the penalty of 20l. to be paid by the plaintiff ſuing there *(i)*; the anſwer to which was, that the ſtatute 17 Ric. II. ſhould be executed. It was upon the idea of this petition that ſtat. 15 Hen. VI. c. 4. was paſſed, by which it is enacted, that no writ of *ſubpœna* ſhould be granted till ſurety was found to ſatisfy the party grieved and vexed for his damage and expence, if the matter of the bill ſhould not be made good.

(a) Vadlet. *(b)* Stat. 6 Hen. VI. c. 3. Stat. 23 Hen. VI. c. 13. *(c)* Stat. 8 Hen. VI. c. 4. *(d)* Stat. 2 Hen. VI. c. 7. *(e)* Stat. 1 Hen. VI. c. 1. 4. 6. Stat. 2 Hen. VI. c. 6. 9. 12, 13, 14. Stat. 8 Hen. VI. c. 24. Stat. 27 Hen. VI. c. 3. *(f)* Stat. 2 Hen. VI. c. 4, 5. *(g)* Stat. 1 Hen. VI. c. 2. *(h)* Stat. 8 Hen. VI. c. 10. Stat. 18 Hen. VI. c. 7. Stat. 23 Hen. VI. c. 17. Stat. 39 Hen. VI. c. 2. *(i)* Cott. Abri. p. 566. § 41.

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In the thirty-firſt year (*a*) of the king a ſtatute was paſſed, to give effect to the proceſs by which perſons were brought before the council. This act is very particular in the terms of it; and as it throws ſome light upon the nature of that juriſdiction, it may be proper to ſtate it minutely, leaving the reader to make that application of it which the former part of this Hiſtory will naturally dictate. It ſays, that upon ſuggeſtions and complaints made as well to him as to the lords of his council, againſt perſons for *riots*, *oppreſſions*, and *grievous offence* by them done againſt the peace and laws, the king uſed to give commandment by writs under his great ſeal, and by his letters of privy ſeal, to appear before him in his chancery, or before him and his council, to anſwer for the above offences. Becauſe theſe writs had not met with regular obedience, it was now ordained, that where ſuch writs or letters iſſued, commanding any one to appear before the king or *his council*; and the perſon refuſed to receive it, or withdrew himſelf, or did not appear, and ſuch diſobedience was duly certified to the council; then the chancellor ſhould have power to direct writs of proclamation into the county where the party dwelt, or the next adjoining county, *and alſo* into London, commanding the ſheriff, under the penalty of 200l. to make open proclamation in the ſhire-town, and in the city, three ſeveral days immediately after delivery of the writ, for the party to appear before the council, or the chancellor, within a month after the laſt day of proclamation; the writ to be returned into the chancery within ſeven days after the proclamation, under the ſame penalty. If the party did not appear within the month, then he was to forfeit, if a lord, all offices, fees, annuities, and other poſſeſſions, that he, or any one to his uſe, had of the grant of the crown; and if upon the iſſuing of a ſecond writ and proclamation he ſtill made default, he was to forfeit his eſtate and name of lord, and place in parliament. If he had no grant from the crown, then he was to forfeit his name and eſtate of lord, and place in parliament, and alſo all his lands and tenements; but all the above forfeitures were only for life. If the party was a commoner, he was to be puniſhed for diſobedience to the firſt writ by fine, at the diſcretion of the two chief juſtices; but if he had no livelihood whereof to pay a fine, he was to be put out of the king's protection. There was the uſual proviſo in favour of perſons under the diſabilities of ſickneſs, impriſonment, being out of the realm, and the like.

(*a*) Ch. 2.

WHILE the legiſlature by this ſtatute gave new vigour and energy to the authority of the council, it did not forget the regard which ſhould be paid to the courts of common law; for in the concluſion of it the ſtatute declares, that no matter determinable by the law of the realm ſhould be determined otherwiſe than by the courſe of the law in the king's courts.

THE authority of other courts was affected by the interference of parliament. It was complained, that the ſteward and marſhal held pleas of debt, detinue, and other perſonal actions between parties who were not of the king's houſehold; and when they were mentioned in the record to be of the houſehold, they were not permitted to take their exception to ſuch allegation. It was enacted by ſtat. 15 Hen. VI. c. 1. that in every ſurety thenceforward to be taken for a defendant, he ſhould not be eſtopped by the record, to ſay that himſelf or the plaintiff was not of the king's houſe, as ſuppoſed by the record. By ſtat. 24 Hen. VI. c. 1. juſtices of *niſi prius* were empowered to give judgment in all caſes of felony and treaſon, as well upon acquittal as conviction, and to award execution. By chap. 3. of the ſame act, the aſſiſes for Cumberland are directed to be held at Carliſle.

THE following are the few alterations made in the courſe of proceeding in different actions. Other ſtatutes were made in this reign to correct ſome of the inconveniences that followed from the late device of ſeparating the legal from the equitable eſtate; the object of which was to make the *pernor of the profits*, as he was called, liable to ſuch demands and burthens as he would be ſubject to if he was legally ſeiſed of the freehold. The firſt act of this kind is ſtat. 11 Hen. VI. c. 3. It had been held, that the ſtat. 4 Hen. IV. c. 7. was confined to an aſſiſe of novel diſſeiſin; but by this act it was declared, that the ſame remedy might be had in all manner of writs grounded upon novel diſſeiſin. Again, becauſe tenants for life, and for years, would let their eſtate to perſons unknown to their leſſors, but ſtill continued to occupy and take the profits to their own uſe, and commit waſte, it was enacted by chap. 5. of the ſame act, that the reverſioner might maintain a writ of waſte againſt ſuch pernors of the profits as well after as before the grant.

Statutes of pernors of profits.

AN act was made to prevent plaintiffs in aſſiſe charging the ſheriff as a diſſeiſor, in order that the writ might be directed to the coroners: it was provided by ſtat. 11 Hen. VI. c. 2. that the tenant might aver that the ſheriff was not a diſſeiſor, nor tenant, but was named diſſeiſor by colluſion; and if it was ſo found, the writ was to be quaſhed, and the plaintiff amerced.

SOME

Attaints.

SOME helps were contrived for rendering the proceeding by attaint more expeditious and effectual. The delay of attaints was heavily complained of. It was ſaid, that when the grand jury appeared in court, and were ready to paſs, one of the tenants or defendants, or one of the petty jurors named in the writ, would plead falſe and feigned pleas not triable by the grand jury, ſo that the taking of the grand jury was delayed till ſuch pleas were tried; and after ſuch pleas had been tried for the plaintiffs, another of the jurors, tenants, or defendants might plead another feigned plea, *puis darrein continuance*; the reſt might do the ſame; and though all were found againſt them, they were ſubject to *no pain*, ſays the act. In order therefore to prevent ſuch ſtudied delays, it was provided by ſtat. 11 Hen. VI. c. 4. that the plaintiffs in ſuch attaints ſhould recover their damages and coſts againſt all ſuch tenants, jurors, and defendants. When it is conſidered, that there could not be leſs than thirteen defendants in an attaint, and that each of theſe might have a ſeveral plea, it is eaſy to conjecture to what a number of obſtacles it was liable. The laſt mentioned act being thought too general, it was ordained by ſtat. 15 Hen. VI. c. 5. that ſhould any foreign plea be found againſt the defendant, there ſhould be the ſame judgment againſt him as if the grand jury had paſſed againſt him, without any prejudice to the co-defendants. The ſame ſtatute provided likewiſe for the qualifications of jurors in attaints, as did alſo ſtat. 18 Hen. VI. c. 2.

IN ſome caſes of a particular kind, a ſpecial mode of redreſs was preſcribed by ſeveral ſtatutes. It had often happened, that women were ſtolen away, and kept under reſtraint, or ſometimes married by force, till they had ſigned ſome obligation or engagement for payment of money. As a more expeditious remedy than the law hitherto had provided, it was ordained by ſtat. 31 Hen. VI. c. 9. that, in all ſuch caſes, the party bound might have a writ out of chancery, containing the matter of complaint, and commanding the ſheriff to make *proclamation* in the next full county after receipt of the writ, for the perſon offending to appear at a certain day before the chancellor or the juſtices of aſſiſe for the county, or ſome other *notable perſon* to be aſſigned by the chancellor, who was to examine the parties; and if the obligations were found to be ſo made, they were to be declared void, as well as all proceſs and execution thereon, whether the offender appeared at the day or not. There was a penalty of three hundred pounds upon ſheriffs not executing the writ, half to the king, and half to the party ſuing the writ, to be recovered in an action of debt, in which action no protection,

Writs of proclamation.

tection, wager of law, or foreign plea to be tried in another county, was to be allowed.

THE writ of proclamation was applied in another inſtance by ſtat. 33 Hen. VI. c. 1. where ſervants availing themſelves of the conſternation prevailing in the family upon the death of their maſter, would violently and riotouſly take away the goods of the deceaſed: it was by that ſtatute provided, that in ſuch caſe the chancellor, by the advice of the chief juſtices and the chief baron, or two of them, ſhould, upon the application of two executors at leaſt, direct ſuch writs as they thought proper to ſheriffs, to make proclamation in cities, boroughs, towns, or other places, two market-days, within the ſpace of twelve days next after delivery of the ſame writs, to appear in the king's bench at a certain day, ſo as the laſt proclamation ſhould be made within fifteen days before the day of appearance: if the writ was returned, and the party did not appear at the day, he was to be attainted of felony: if he appeared, he was to be committed to priſon, till he anſwered to ſuch actions as ſhould be brought againſt him by the executors, either by bill or by writ, for the aforeſaid riot, taking and ſpoiling, provided the action was brought without delay, and not in order to keep them maliciouſly in priſon. This act, like the former, contains penalties for the neglect of thoſe who were intruſted with the execution of it. Executors had before been provided with a new remedy for keeping together the effects of the deceaſed, by ſtat. 9 Hen. VI. c. 4. which gave them the writ of *idemptitate nominis* in the ſame manner as the teſtator might before have had it.

THE remaining ſtatutes concerning the adminiſtration of juſtice relate either to proceſs and proceeding in general, or to the methods of trial, and the duty incumbent on officers of courts. Some ſtatutes of *jeofail* and amendment were paſſed. The firſt act of this ſort, which was made in the time of Edward III. had been extended by an act of the laſt king (*a*), to amendments as well after judgment as before; but this ſtatute, being temporary, had expired with that king's reign: it was therefore now afreſh enacted by ſtat. 4 Hen. VI. c. 3. that the act of Edward III. ſhould be in force in every record and proceſs, as well after judgment given upon a verdict paſſed, as upon a matter in law pleaded; and moreover, that it ſhould be perpetual; but it was not to extend to records and proceſſes in *Wales*, nor to procedings where a proceſs of outlawry lay. After reviving the ſtatute of Henry V.

Statutes of jeofail.

(*a*) Stat. 9 Hen. V. c. 4.

and that of Edward III. the legiſlature made further proviſion on the ſubject of amendments. It was enacted by ſtat. 8 Hen. VI. c. 12. that for error aſſigned in any record, proceſs, or warrant of attorney, original or judicial writ, pannel, or return in any places of the ſame raſed or interlined, or in any addition, ſubtraction or diminution of words, letters, titles, or parcel of letters found therein, no judgment ſhould be reverſed, or record annulled; but that the judges of the court ſhould have power, with their clerks, to examine the ſame, and reform and amend (in affirmance of the judgment of ſuch records and proceſſes) all that which to them, in their diſcretion, ſeemed to be miſpriſion of the clerks, ſo that no judgment ſhould be reverſed, or record annulled, by reaſon of ſuch miſpriſion. Out of this act are excepted all appeals and indictments of treaſon and felony, and the outlawries of the ſame, and the ſubſtance of the proper names, ſurnames, and additions left out in original writs and writs of exigent, according to ſtat. 1 Hen. V. c. 5. and in other writs containing proclamations.

SOME further regulations were made by this act reſpecting records. If any record, proceſs, writ, warrant of attorney, return, or pannel, was certified defectively, it might now, upon the challenge of the party, be reformed, and amended according to the original; and if ſuch original was ſtolen in any of the four courts at Weſtminſter, or in the treaſury of ſuch courts, by any clerk or other perſon, by reaſon whereof any judgment ſhould be reverſed, he and his aiders were to be conſidered as felons. This fact was to be tried by the judges of the two benches, and a jury, half of which was to conſiſt of men belonging to the courts. Again, it was provided by ch. 15. of the ſame ſtatute, that the king's juſtices ſhould amend all miſpriſions or defaults in records or proceſſes, or in the returns of the ſame, made by ſheriffs, coroners, bailiffs of franchiſes, or others, by miſpriſions of clerks of the court, the ſheriffs, or their clerks and other miniſters, in writing one ſyllable too much or too little; following almoſt the words of the ſtatute of Edward III. with the ſame exception of records and proceſs in Wales, and thoſe of outlawry of felonies and treaſons.

Juries. SOME laws were made for the better ordering of juries. Becauſe, in *ſpecial* aſſiſes, the parties were not furniſhed with pannels of the jurors before the day of the ſeſſions, and therefore had not time to ſee that they were all duly qualified, it was enacted by ſtat. 6 Hen. VI. c. 2. that the pannels ſhould be arrayed, and an indented copy thereof delivered by the ſheriff to the parties (if they demanded it) ſix days at leaſt before the ſeſſions of the juſtices.

juſtices. The jury *de medietate*, which had been granted by ſtat. 28 Ed. III. c. 13. (*a*), was thought to be repealed by ſtat. 2 Hen. V. ſt. 2. c. 3. which requires jurors to be freeholders; a qualification that could not poſſibly be enjoyed by aliens; to repel which inconvenient conſtruction, it was enacted by ſtat. 8 Hen. VI. c. 29. that thoſe qualifications ſhould extend only to inqueſts to be taken between denizen and denizen. Becauſe the ſheriff or his officers were often bribed to return favourable juries, an action was given by ſtat. 18 Hen. VI. c. 14. to recover ten times the money given for ſuch purpoſes. And, what is remarkable, the ſtatute authorizes the juſtices to enquire of the truth, *as well by examination of the defendant* in ſuch ſuit for the penalty, as by an inqueſt. But this was only a temporary act, and expired with the then parliament. Another temporary act directed (*b*), that all foreign pleas, pleaded after the return of the *venire*, ſhould be tried where the writ was brought. Some other ſtatutes were made at different times in this reign, which being of ſhort continuance, were ſoon forgotten (*c*).

It ſeems, that the officers of the court would ſometimes make the entry of *obtulit ſe in propriâ perſonâ*, when in truth the plaintiff had never appeared; but it was ordained by ſtat. 10 Hen. VI. c. 4. that no filazer, exigenter, or other officer, ſhould make ſuch entry, unleſs the plaintiff appeared in proper perſon before ſome of the juſtices where the plea was depending, and was there ſworn upon a book, that he was the ſame perſon. His counſel, or ſome other perſon, might make the oath for him. Again, becauſe in many outlawries the entry was, that the parties appeared by their attorney, where, in truth, the attornies had no warrant of record, on which account the outlawries uſed to be reverſed; it was enacted, that every attorney, who had not his warrant entered of record in all ſuits wherein proceſs of *capias* and *exigent* were awardable the ſame term in which the *capias* was awarded, or before, ſhould be fined forty ſhillings by the juſtices.

It was endeavoured to put the office of ſheriff, and other miniſters of juſtice, upon a footing which would render the execution of them more regular, effectual, and incorrupt. Two acts had been made in the reign of Ed. III. (*d*) ordaining, that no ſheriff ſhould ſtay in office more than a year: again, by ſtat. 1 Ric. II. c. 11. no one who had ſerved, was to be choſen again within

Sheriffs, and execution of proceſs.

(*a*) Vid. ant. 72. (*b*) Stat. 23 Hen. VI. c. 12. (*c*) Stat. 4 Hen. VI. c. 1. 2. Stat. 8 Hen. VI. c. 13. Stat. 11 Hen. VI. c. 7. Stat. 20 Hen. VI. c. 2. Stat. 33 Hen. VI. c. 7. (*d*) Stat. 14 Ed. III. ſt. 1. c. 7. Stat. 42 Ed. III. c. 9.

three years. Notwithſtanding theſe acts, it ſeems that ſheriffs uſed to be continued ten or twelve years in their office, which led to great abuſes in the adminiſtration of it. To prevent this, it was now again enacted, by ſtat. 23 Hen. VI. c. 8. that the former ſtatute ſhould, in future, be duly obſerved; with an exception of the under-ſheriffs, and all other officers in the city of London; of ſuch counties where ſeveral perſons were inheritable to the office, and had a freehold therein; as alſo with an exception of letters patent made of the office, and the under-ſheriffs and clerks of ſuch patentees. And it was further ordained, that if any ſheriff, under-ſheriff, or ſheriff's clerk, occupied their office in violation of the above acts (with the above exception), he ſhould forfeit 200l. yearly, half to the king and half to the perſon ſuing, as long as he continued therein. All pardons of this offence, and all patents granting the office for years, for life, or in fee, contrary to this act, are declared void, notwithſtanding any clauſe of *non obſtante*; and the perſons taking ſuch patents were declared for ever diſabled to hold the office.

THIS act was ſucceeded by another in the ſame year (*a*), containing ſeveral regulations for their government in diſcharging their office, and that of others in the like employment, as under-ſheriffs and their clerks, coroners, ſtewards of franchiſes, bailiffs, and keepers of priſons. It was enacted, in order to avoid *perjury, extortion, and oppreſſion*, that no ſheriff ſhould in any manner let to ferm his county, or any of his bailiwicks, hundreds, or wapentakes (as had been before forbid by ſeveral acts); nor ſhould any ſheriff, under-ſheriff, bailiff of franchiſes, or other bailiff, return upon an inqueſt any bailiffs, officers, or ſervants of any of the before-mentioned officers; and that none of them ſhould, by occaſion or colour of his office, take any thing by himſelf, or by others to his uſe, profit, or avail, from any perſon by them to be arreſted or attached, for omitting an arreſt or attachment, or for ſhewing eaſe or favour, except only the fee of twenty pence to the ſheriff, and four pence each to the bailiff and the gaoler, if he was committed to ward. Nor were they to take for the making of any return, or pannel, and the copy of a pannel, more than four pence. After theſe reſtrictions as to fees, there follows the famous clauſe concerning letting to bail upon arreſts, which is worded in the following way: That the ſheriffs, and all other officers and miniſters above mentioned, ſhould let out of priſon all manner of perſons arreſted by them, or being in their cuſtody by force of any writ, bill, or warrant in any action perſonal, or by cauſe of indictment of treſpaſs, upon

(*a*) Ch. 10.

reaſonable

reaſonable ſureties of ſufficient perſons, having ſufficient within the counties where ſuch perſons be let to bail or mainpriſe, to keep their days in ſuch places, as the ſaid writs, bills, or warrants require; with an exception of the following perſons; namely, thoſe in ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, ſurety of the peace, and thoſe committed by ſpecial commandment of any juſtice, and vagabonds refuſing to ſerve according to the ſtatute of labourers. Nor was the ſheriff, or officers before mentioned, to take an obligation for the above cauſes, or by colour of their office, but only to themſelves, and by the name of their office, and upon condition written, that the priſoner ſhould appear at the day and place contained in the writ, bill, or warrant; and all other obligations taken by colour of their office were declared void; and four pence was the utmoſt he was to take for making ſuch obligation, warrant, or precept. It was further ordained, that all ſheriffs ſhould yearly appoint a deputy in the court of chancery, king's-bench, common-pleas, and exchequer, to receive all writs and warrants to be delivered to them; and this was to be done before they returned any writs. Any of the above officers breaking this act, were to forfeit to the party grieved treble damages; and, moreover, 40l. half to the king and half to the party grieved. The charge of this act was given not only to the juſtices of aſſiſe and of the two benches, but alſo to juſtices of the peace, who were empowered to hear and determine *ex officio*, without ſpecial commiſſion, all breaches thereof. As a caution in favour of the old courſe, which otherwiſe might be thought to be waived by the above clauſe about bailing, it was added, that ſheriffs who made a return of *cepi corpus*, or *reddidit ſe*, ſhould ſtill be chargeable to have the body at the day of return, as before the making of the act. The warden of the *Fleet*, and of the king's palace at Weſtminſter, were excepted out of this act.

An act was made in the early part of this reign *(a)*, requiring, that all officers appointed by the king's letters patent, within his courts, and who had power to nominate clerks and miniſters, ſhould be ſworn to appoint ſuch perſons as they would anſwer for, and who would regularly attend their duty there. Theſe were the meaſures now purſued for ſecuring the chaſte adminiſtration of juſtice, inſtead of increaſing the number of ſtatutes paſſed in the reign of Edward I. againſt maintenance and champerty, ſo much practiſed at that time by the officers of courts.

(*a*) Stat. 2 Hen. VI. c. 10.

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Attornies.

THERE is an act relating to attornies, which deſerves ſome notice for the ſingularity of the facts it contains; it is ſtat. 33 Hen. VI. c. 7. which ſays, that not long ſince in the city of Norwich, and in the counties of Norfolk and Suffolk, there were only *ſix* or *eight* attornies, at moſt coming to the king's courts, in which time great tranquillity reigned in thoſe places, and little vexation was occaſioned by untrue and foreign ſuits. But now, ſays the act, there are in thoſe places *fourſcore* attornies, or more, the generality of whom have nothing to live upon but their practice, and beſides are very ignorant. It complains, that they came to markets and fairs, and other places, where there were aſſemblies of people, exhorting, procuring, and moving perſons to attempt untrue and foreign ſuits for ſmall treſpaſſes, little offences, and ſmall ſums of money, which might be determined in courts-baron; ſo that more ſuits were now raiſed for malice than for the ends of juſtice, and courts-baron became leſs frequented. Theſe are the motives the act ſtates for making a reformation; which was, that in future there ſhould be but *ſix* common attornies in the county of Norfolk, the ſame number in Suffolk, and in the city of Norwich only *two:* theſe were to be admitted by the two chief juſtices, of the moſt ſufficient and beſt inſtructed; and perſons acting as attornies in thoſe parts without ſuch admiſſion, were ſubjected to heavy penalties.

Treaſon to burn houſes.

THE firſt ſtatute that anywiſe affected the criminal law in this reign is ſtat. 2 Hen. VI. c. 17. which made it treaſon for any to eſcape out of priſon if he was indicted, appealed, or taken on ſuſpicion of high treaſon. The penalty of treaſon was inflicted on other offenders of different kinds. Becauſe letters had been ſent to perſons demanding money to be put in certain places, with threats to burn their houſes if they did not comply, it was enacted by ſtat. 9 Hen. VI. c. 6. that all ſuch burnings ſhould be judged high treaſon. However, that the landholders might not be prejudiced by ſuch an extenſion of the ſtat. 25 Edw. III. it was declared that forfeitures ſhould be ſaved to lords, as in caſes of felony: the like exception was made in ſtat. 20 Hen. VI. c. 3. which made it high treaſon for any inhabitant of Wales or the Marches to carry away cattle out of the Engliſh counties. This plundering had occaſioned an act in the reign of Hen. IV. (*a*) among other regulations for reſtraining the outrages of the Welch. Again, by ſtat. 23 Hen. VI. c. 3. the ſheriff of Herefordſhire was injoined under penalties to take all offenders coming out of Wales to market, and to levy hue and cry after them. The

(*a*) Stat. 2 Hen. IV. c. .

ſtat.

ſtat. 20 Hen. VI. c. 5. being left to expire after it had been continued by an act in the laſt parliament (*a*), the like proviſion was again enacted by ſtat. 28 Hen. VI. c. 4. which likewiſe extended it to the people of Lancaſhire and other parts; for if any one took any goods, chattel, or *perſon* out of the counties and ſeignories royal in Wales and the duchy of Lancaſter, and carried them to any other places, it was adjudged felony.

Other felonies were enacted by ſtatute. Becauſe maſons uſed to hold confederacies and meetings to concert ſchemes for oppoſing the ſtatutes of labourers, it was enacted by ſtat. 3 Hen. VI. c. 1. that any one cauſing ſuch *chapiters or congregations* to be aſſembled, ſhould be adjudged guilty of felony. Among other penal laws for the regulation of trade, it was by ſtat. 11 Hen. VI. c. 14. made felony to carry any goods and merchandiſe of the ſtaple into creeks, as was often done to avoid the cuſtoms: this was a temporary act, which expired in three years. Again, it was by ſtat. 18 Hen. VI. c. 15. made felony to carry wools or woolfels to other places than the ſtaple at *Calais*. Trade and commerce had now become very important objects in the contemplation of the legiſlature, and many other acts of a penal nature were made for the protection of them.

Proceſs in criminal cauſes.

The alterations made in criminal proceedings are of more conſequence to the hiſtorical lawyer: theſe relate principally to proceſs, to indictments, and to jurors. A law was made for the government of proceſs in the king's bench, where it was common to get a perſon indicted "by ſuſpect jurors, hired and procured to the ſame by confederacy and covin of the ſaid conſpirators;" upon which a *capias* uſed to be awarded to the ſheriff of the county where the bench was, returnable within two or four days; when, if the party came not, an *exigent* would be awarded, and ſo the goods of the party became forfeit. Now it was enacted by ſtat. 6 Hen. VI. c. 1. that before any *exigent* was awarded in ſuch caſe, writs of *capias* ſhould be directed as well to the ſheriff of the county where they were indicted, as of the county whereof they were named in the indictment; and this *capias* was to have the ſpace of ſix weeks or longer, at the diſcretion of the juſtices, before the return; and any exigent awarded, or outlawry pronounced before ſuch return, was declared to be null and void. This act was confined to caſes where the defendant lived in the ſame county in which the king's bench then was. The commons had petitioned in the preceding reign, that where a defendant indicted in the king's

(*a*) Stat. 28 Hen. VI. c. 4.)

bench

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bench lived out of the county, there might be three *capias*'s, with fifteen days between each, before the exigent was awarded (*a*). The preferring indictments and appeals in foreign counties, and within liberties and franchiſes, was practiſed as a mode of oppreſſion againſt defendants, who might in this way be put in *exigent* by ſurpriſe, before they knew of any indictment againſt them. To remedy this, it was provided by ſtat. 8 Hen. VI. c. 10. that, before any *exigent* ſhould be awarded, a ſecond *capias* ſhould iſſue preſently after the firſt, into the county whereof the defendant was named in the indictment, returnable on a certain day, containing the ſpace of three months from the date of the laſt writ to the return, where the counties are held from month to month; and where they were held from ſix weeks to ſix weeks, containing the ſpace of four months. This ſecond *capias* was to command the ſheriff to take him if he was to be found, and if not, then to make proclamation in two counties before the return, for him to appear at the day contained in the writ; and if he came not, then the exigent was to be awarded; and all exigents iſſued, or outlawries pronounced otherwiſe, were to be void. This act relates to all caſes, whether treaſon, felony, or treſpaſs. It was further provided, that wherever a perſon was indicted, or appealed in the manner aforeſaid, and was duly acquitted by verdict, he ſhould have a writ and *action upon his caſe*, againſt every procurer of ſuch indictment or appeal, and like proceſs as in a writ of treſpaſs *vi et armis*; and if the procurer was attainted, he ſhould recover treble damages. The proceſs againſt perſons living in the ſame county in caſes of treaſon, or felony, was to continue as formerly.

Because the above ſtatute was thought to have no force but where the *capias* was returnable before the juſtices or commiſſioners who had taken the indictment, it uſed to be evaded by removing the indictment into the king's bench or elſewhere by *certiorari*, and then iſſuing the common-law proceſs; to prevent which, and in explanation of that act, it was declared by ſtat. 10 Hen. VI. c. 6. that in ſuch caſe the ſame proceſs ſhould be had as in the former caſe, otherwiſe the exigent and outlawry ſhould be void.

The ſtat. 2 Hen. V. ſt. 1. c. 9. was revived by ſtat. 8 Hen. VI. c. 14. with this alteration, that before the *capias* was awarded it ſhould be teſtified by two juſtices of the peace, that a common fame and rumour ran of ſuch riots; and where the fact was in the county palatine of Lancaſter, or other franchiſe

(*a*) Cott. Abri. p. 547. § 37.

where

where there was a chancellor and a ſeal, after complaint ſo teſtified by a juſtice or ſheriff, he ſhould award a proclamation and writ, as the chancellor of England might by the former act.

It had been ordained by ſtat. 20 Hen. VI. c. 2. that perſons attainted in the county of Lancaſter ſhould forfeit only ſuch goods as they had within the county; but it being obſerved, that offences were more common within that county than elſewhere, and it being attributed to this circumſtance concerning forfeiture, that act was repealed by ſtat. 33 Hen. VI. c. 2.: however, to check the abuſe of haſty indictments in a local juriſdiction, it was by the ſame act required, that the jurors who found indictments ſhould have certain qualifications in land, or the indictment ſhould be void.

The famous 29th chapter of *Magna Charta* was explained by ſtat. 20 Hen. VI. c. 9. It was there ſaid, that no mention was made in that chapter how ladies of great eſtate, ſuch as ducheſſes, counteſſes, or baroneſſes, were to be put to anſwer, or before what judges they ſhould be judged on indictments of treaſon or felony: it was now ordained, that they ſhould in ſuch caſes, whether married or ſole, be tried as *peers* of the realm.

Forcible entries.

The ſummary proceeding in caſe of *forcible entries*, which had been appointed by ſtat. 15 Ric. II. c. 2. (*a*), was enlarged and rendered more effectual by ſtat. 8 Hen. VI. c. 9. The defects of the former act were, that it did not include entries in a peaceable manner, and a detainer afterwards with force, nor where the perſons entering forcibly were removed before the coming of the juſtices: again, there was no penalty on the ſheriff, if he neglected to obey the precept of the juſtices. Owing to theſe defects, many wrongful and forcible entries were daily made, followed with gifts, feoffments, and diſcontinuances, ſometimes to lords and great perſons for maintenance, and ſometimes to perſons unknown. To comprehend all theſe miſchiefs, it was provided generally, that where any one made forcible entry into lands, tenements, or other poſſeſſions, and held them forcibly, after complaint to the juſtices, they ſhould cauſe the ſaid ſtatute to be executed; and whether ſuch offenders were preſent, or departed before their coming, yet the juſtices, or juſtice, in ſome good town next to the tenements, or in ſome other convenient place, ſhould inquire of the matter by the people of the county, and upon their verdict put the party in poſſeſſion. And if the party making the entry had made a feoffment, or diſcontinuance, to any lord, or other perſon,

(*a*) Vid. ant.

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to diſappoint the poſſeſſor of his recovery; and ſuch conveyances were found in an aſſiſe, or other action to be made for maintenance, they were declared void. In order to make the above enquiry, the juſtices were to iſſue precepts to the ſheriff, to cauſe to come before them ſufficient and indifferent perſons dwelling next about the places, having lands of the yearly value of forty ſhillings above repriſes, under pain of 20l. penalty. It was enacted, that the party diſſeiſed might, in all the above caſes, have an aſſiſe or writ of treſpaſs, and recover treble damages, and a fine ſhould be paid to the king. This act was not to extend to perſons who kept forcible poſſeſſion, if they, or their anceſtors, or they whoſe eſtate they enjoyed, had been in poſſeſſion for three years.

Juſtices of the peace.

THE authority of juſtices of the peace was ſtill increaſing, by the number of articles of ſmall concern which were ſubmitted to their direction and ſuperintendance. Many of theſe have been already mentioned. The following acts were made to govern them in the exerciſe of their juriſdiction. We have ſeen, that by ſtat. 2 Hen. V. c. 4. the juſtices were to hold their ſeſſions four times a-year: it is now ſtated in ſtat. 14 Hen. VI. c. 4. that, conſidering the high courts of juſtice were held in the county of Middleſex in the four terms, at which time the commons were to attend to inquire of ſuch articles as were inquirable there; and that the juſtices held their ſeſſions immediately after the term, more to avoid the penalty of the ſtatute than for any buſineſs they had to tranſact; and that bringing the people together again on that occaſion was harraſſing them both in term and out: under all theſe conſiderations it was enacted, that the juſtices of Middleſex ſhould be diſcharged of the penalty while the court of king's bench ſat in that county, provided they ſat twice a-year at leaſt, and oftener if need were.

IT is complained in ſtat. 18 Hen. VI. c. 11. that notwithſtanding the laws made for aſcertaining the qualifications of juſtices, yet many were of ſmall fortunes, and neceſſitous, ſo as to become contemptible, as well as guilty of great extortions; wherefore it was now provided, that none ſhould be aſſigned who had not lands or tenements to the value of 20l. by the year; and a perſon aſſigned who had leſs than that, was to give notice thereof to the chancellor within a month; and if he did not ſo do, or made any warrant or precept, he incurred the penalty of 20l. and was to be put out of the commiſſion: however, if there were not ſufficient perſons having lands and tenements of the above value, who were learned in the law and of good governance, the chancellor had a diſcretion to put in others. Again, all cities and places were excepted

excepted out of this act, if they had juſtices of the peace living therein, by commiſſion or warrant from the king.

In the reign of Edward IV. the parliament ſeem to be principally taken up with the arrangement of the commercial ſyſtem. Many ſtatutes were made for the regulation of import or export, and for the management of trade and manufactures at home. Among theſe may be ranked ſome ſumptuary laws, which limited the expence and faſhion of dreſs to be worn by different degrees of perſons *(a)*. Very few alterations were made in the law of property, or the adminiſtration of juſtice. In one inſtance, a revolution was effected in an ancient branch of our judicial eſtabliſhment, which from thence began to go almoſt wholly out of uſe. This was ſtat. 1 Ed. IV. c. 2. which took away from the tourn the power of hearing and determining, and transferred it to the quarter ſeſſions. The tourn was the great criminal court of the Saxons (*b*), which had given place in ſome degree to the juſtices of gaol delivery, and of oyer and terminer, after the Norman policy began to be eſtabliſhed. But ſince juſtices of the peace had been inveſted with ſo much authority, this court had been ſtill leſs reſorted to. This want of employment induced the perſons intereſted in the ſupport of theſe courts to try unfair means to ſupply the loſs of their profits.

Statutes of Edward IV.

The juriſdiction of the tourn reſtrained.

This appears from the preamble of the act, which ſtates the reaſon for the change it was going to make, in the following words: "Becauſe, by "the inordinate and infinite indictments and preſentments, as well of felony, "treſpaſs, and offences, as of other things, which had of long time been "taken before ſheriffs in their counties, under-ſheriffs, their clerks, bailiffs, "and miniſters, at their tourns or law-days; which indictments and pre-"ſentments were oftentimes affirmed by jurors having no conſcience, nor "any freehold, and little goods; and often by the ſaid ſheriffs' menial ſer-"vants and bailiffs, and their under-ſheriffs, by which indictments people "were attached and arreſted, and put in priſon, and conſtrained to "make grievous fine and ranſom; after which they would be enlarged, "and the indictments embezzled and withdrawn:" the act therefore ordains in future, that the above perſons ſhould not have power to arreſt any one, or levy fines by colour of indictments ſo taken; but they ſhould deliver all ſuch indictments to the juſtices of the peace at their next ſeſſions of the peace, under the penalty of forty pounds. The juſtices were to award proceſs thereon, the ſame as if the indictment was taken before them; and to arraign, and deliver or fine

(*a*) Stat. 3 Ed. IV. c. 5. Stat. 22 Ed. IV. c 1. (*b*) Part I. 5.

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the defendants. The eſtreat of ſuch fines was to be delivered to the ſheriff, who was to forfeit one hundred pounds, if he arreſted, put in priſon, or levied any fine before he had proceſs from the juſtices. This act did not extend to the ſheriffs of London, nor to any indictment taken within that city. Thus did the quarter ſeſſions riſe upon the deſtruction of the tourn.

THE adminiſtration of civil juſtice in one particular inſtance was regulated by ſtat. 17 Ed. IV. c. 2. relating to the court of *Piepowder*. This court was for the determination of queſtions ariſing upon contracts in fairs, and was generally held by the ſteward of the manor where the fair was kept. The diſpatch with which matters were decided in this court, as well as other reaſons, tempted many to bring ſuits here that belonged properly to the common law: to prevent this, it was now ordained, that in ſuch cauſes the plaintiff or his attorney ſhould ſwear, that the matter aroſe within the bounds and juriſdiction of the fair; which point might be conteſted by the defendant.

THE ſtatute of Henry VI. and the former acts, which confined ſheriffs under great penalties to the exerciſe of their office for a ſingle year, had been diſregarded during the firſt three or four years of this reign. As this was attributed to the unſettled ſtate of things, which made it convenient to avoid a change, an act was paſſed (*a*) for indemnifying ſuch ſheriffs againſt the penalties. Again, ſheriffs were indemnified againſt the penalty for returning writs after the 6th of November, if they had not received a writ of diſcharge (*b*): for the appointment of new ſheriffs being on the morrow of *All Souls*, they did not receive their patents, nor qualify themſelves, till long after Michaelmas term; owing to which, there was, before this act, a chaſm during that interval in the office of ſheriff. The proviſions of this act were enacted more generally in another ſtatute (*c*), which gives the old ſheriffs authority to do every act belonging to the office during Michaelmas and Hilary terms, unleſs they were lawfully diſcharged.

THE playing at certain games was forbid by ſtat. 17 Ed. IV. c. 4. and thoſe who ſuffered them to be uſed in their houſes, or other places, were to be impriſoned for three years, and forfeit twenty pounds. In conſideration of the frequent trouble that freeholders were put to in the county of Middleſex more than in any other county, as they were called upon to attend on juries in the four courts at Weſtminſter, beſides the quarter ſeſſions, and

(*a*) Stat. 8 Ed. IV. c. 4. (*b*) Stat. 12 Ed. IV. c. 1. (*c*) Stat. 22 Ed. IV. c. 6.

the

the like; and becauſe, upon the *venire* or *habeas corpora*, an eſſoin might be caſt by the plaintiff or defendant, and then *all* the jurors would be put in default; it was ordained, that in ſuch caſe, the jurors ſhould be demanded at the fourth day of the return, and the appearance of ſuch as were preſent be recorded *(a)*.

Statutes of Richard III.

THE ſhort reign of Edward V. gave no time for the ſummoning of a parliament. The reign of Richard III. did not, ſhort as that alſo was, paſs without leaving ſome remembrances of it on our judicial polity. The firſt three acts of this king were very important in their object and effect. Theſe were, firſt, for enabling *ceſtui que uſe* to diſpoſe of the land; ſecondly, to relieve the ſubject from benevolences; thirdly, for letting priſoners to bail.

Ceſtui que uſe to make eſtates.

WE have ſeen the expedients which had already been reſorted to, for correcting the difficulties that followed from conveying land to a uſe. But the evil was ſtill felt, and was complained of in the preamble of this act as exiſting in all its force. It was ſaid, "that no man buying lands, tenements, rents, "ſervices, or other hereditaments, nor women who had jointures, or dowers, "nor men's laſt wills to be performed, nor leaſes for term of life or of "years, nor annuities granted for term of life or otherwiſe, nor perſons in-"tereſted in any of theſe ſpecies of property, could be in ſafety, becauſe of "privy and unknown feoffments:" the meaning of which was, that after a feoffment or gift was made by the apparent owner of the eſtate, it would turn out, that he was only *ceſtui que uſe*, and therefore not enabled by law to do any act which could charge the freehold. It was therefore now enacted, that every feoffment, eſtate, gift, grant, releaſe, confirmation, and leaſes of lands, tenements, rents, ſervices, or hereditaments, made by any perſon of full age and at large, and all recoveries and executions ſo had or made, ſhould be good and effectual againſt the feoffor and his heirs, and thoſe claiming any intereſt to their uſe. Thus was the *ceſtui que uſe* empowered to diſpoſe of the eſtate, in the ſame manner as the *feoffee to the uſe* might at common law. It will ſoon be ſeen, that this new expedient to remedy the inconvenience of uſes, only produced more confuſion, as now two perſons had an equal right to diſpoſe of the ſame land.

Benevolences aboliſhed.

THE ſecond chapter of this act declares, that the *benevolences* heretofore enacted ſhould not be drawn into example, but that exactions of that ſort

(a) Stat. 8 Ed. IV. c. 3.

ſhould

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ſhould no longer be levied. Theſe *benevolences* had been introduced by Edward IV. and the abolition of this mode of raiſing money was an attempt of Richard to conciliate to him the nobility and great men, who were the principal ſufferers in theſe involuntary donations to the crown.

Letting priſoners to bail.

THE third chapter of this act complains, that perſons were daily arreſted and impriſoned for felony, ſometimes thro' malice, and ſometimes on light ſuſpicion, and ſo kept without bail or mainpriſe, to their great vexation and trouble. The old remedy in ſome of theſe caſes was the writ *de odio et atiâ*; in others, they had no reſource but the diſcretion of the ſheriff, who acted under the authority of ſtat. 1 Weſtm. It was now provided, that every juſtice of the peace ſhould have diſcretion to let ſuch perſons to bail or mainpriſe, in the ſame manner as if they had been indicted before them at the ſeſſions. It was further enacted, that no ſheriff or other perſon ſhould ſeiſe the goods of one who was arreſted or impriſoned, before conviction or attainder, upon pain of forfeiting double the value of the things ſo taken; which regulation was conformable with the law in Bracton's time (*a*). The proviſion made by this ſtatute about bailing, was re-conſidered in the next reign, when a new act was made.

Fines.

ANOTHER remarkable proviſion of this king was the ſtatute of fines, which like the preceding ſerved as a model for another act in the next reign on the ſame ſubject. This ſtatute is chap. 7. of Richard III. It refers to the ſtat. *de finibus*; and, to increaſe the great ſecurity and confidence repoſed in fines, it enacts, that, after the engroſſing, every fine ſhould be openly and ſolemnly read and proclaimed in court, the ſame term, and the three next terms; during which ceremony all pleas ſhould ceaſe; and then a tranſcript ſhould be ſent from the juſtices to the juſtices of aſſiſe of the county where the lands lay, who were in like manner to cauſe it to be proclaimed in every one of their ſeſſions that year; the ſame of the juſtices of the peace; which proclamations were to be certified the ſecond return of the following term. After theſe proclamations and certificates, ſuch fine was to conclude as well privies as ſtrangers, except women covert not parties to the fine, perſons within age, in priſon, out of the realm, or not of whole memory; with a ſaving of the claims of all others having a title at the time of the fine being levied, ſo as they proſecuted their claim, by action or entry, in five years after the proclamation and certificate; and alſo ſaving the rights of thoſe upon whom

(*a*) Part I.

a title

a title deſcended after the fine, provided they purſued their right in five years after ſuch title came to them; or, if the perſons were under any diſabilities or defects, within five years after the removal thereof. The ſtatute has a clauſe enabling perſons to levy fines according to this act, *or* at the common law. Theſe are the legiſlative acts of this reign which relate to matters of a judicial nature; the reſt concern the trade and commerce of the country.

CHAP.

CHAP. XIV.

HENRY VI. EDWARD IV. EDWARD V. RICHARD III.

Judicature in Parliament—Origin of private Acts—The Court of Equity in Chancery—Cases determined before the Chancellor—Of Uses—Their Nature and Properties—Entails and Remainders—An Executory Devise—Perpetuities declared void—Taltarum's Case—Actions of Assumpsit—Ejectione Firmæ—Of Pleading—Proceeding by Bill in the King's-Bench—The Criminal Law—The King and Government—The Statutes—Reports—Fortescue de Laudibus, &c.—Littleton—Statham—Miscellaneous Facts.

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THE decisions of courts during these reigns present many interesting points of historical investigation. Among other subjects of improvement, we see the birth of that system of equity which is administered by the court of chancery; we find the doctrine of uses, and the application of a common recovery to the barring of estates tail fully established. These were topics unknown to our old law. In the mean time, the learning of real actions gradually gave way, personal writs became more frequent, and pleading grew into a science of much nicety and refinement: in short, the whole face of the law seems to be assuming that character which it has retained to the present day. So large a field is here opened, that should we only go into such passages of this period as seem properly to belong to the juridical historian, we might, perhaps, engage further than every reader would be disposed to follow: we shall therefore content ourselves by selecting certain heads of inquiry that stand more eminently distinguished from the many others which are furnished by the valuable reports of these times.

Judicature in parliament.

THOUGH the commons in the reign of Henry IV. *(a)* were checked in their attempt to partake in the judicial authority of the king and lords, and the letter of the above resolution stood on record against them; yet such a solemn declaration that their assent was necessary to all *statutes*, joined to some reasoning on the question, at length led to the establishment of this

(*a*) Vid. ant. 277.

legislative

legiſlative right. The king and lords, however, went on making awards on petitions during the reigns of Henry IV. V. and thoſe that followed; till at laſt it became too clear, that all theſe, as alterations, in that particular inſtance, of the law, could no longer with propriety be called judgments or awards, but were to all intents and purpoſes legiſlative acts, and, as ſuch, ſhould be aſſented to by the whole parliament. We ſhall preſently ſee the ſteps which led to this.

The criminal part of the original judicature in parliament was exerciſed in numberleſs inſtances during this period, and frequently aſſiſted the reigning party in deſtroying their enemies, when the common tribunals (ſummary as even they were) could not, conſiſtently with a colour of legal formality, completely execute their vengeance. We have no intimation that the commons were at all deſirous of taking any part in theſe judgments. In a former reign (*a*), the lords temporal, with the king's aſſent, adjudged, that ſeveral lords, two knights, and others, who had been taken and beheaded as traitors and rebels, ſhould forfeit all their lands in fee which they had ſuch a day, with all their goods and chattels; to which judgment all the lords preſent put their names (*b*). This could not be conſidered as a judgment *ſecundum legem et conſuetudinem Angliæ*; as it gave, contrary to the common law, a forfeiture of lands *after* the death of the parties; and that, too, where ſome of them were commoners. This could only operate as a legiſlative act.

Sir John Mortimer, having been committed to the Tower on ſuſpicion of high treaſon, had eſcaped, and was in 2 Hen. VI. indicted for that eſcape: being again apprehended, he was brought before parliament, and judgment was given againſt him upon the indictment. This was a judicial act of the legiſlative kind, if it may be ſo called, which it does not appear the commons had any ſhare in, nor did they make any proteſtation in favour of their pretenſion. Theſe are ſelected out of many caſes of the like kind during the period of which we are now writing.

Though the houſe of commons had acquired great weight in the conſtitution during theſe reigns, particularly under the houſe of Lancaſter, there is no mention of their having concerned themſelves in theſe parliamentary judgments of life and death. But at length a politic prince found it convenient to make uſe of them, to give colour to the proſecution of a great and ob-

(*a*) Henry IV. (*b*) 2 Parl. Hiſt. 64.

noxious man; and by that meaſure paved the way to fixing the commons in this legiſlative right. This was in the proceedings againſt the duke of Clarence, in the 17th year of Edward IV. What makes this more remarkable is, that it was at a time when the ſteward of England preſided, and the lords might ſeem to be no longer acting in their parliamentary character, but ſimply as a court. However, the king was in the houſe, and appeared in the light of a proſecutor; for he was the perſon, and the only one who enforced the charge againſt the duke. Some evidence was produced; and the houſe of lords were of opinion, that the evidence was ſufficient, and therefore proceeded to condemnation; the duke of Buckingham, for that time high-ſteward, pronouncing the ſentence; but the execution was delayed. The charge againſt this unhappy prince was that of treaſon, with the overt acts of uſing incantations, and ſpreading reports of the king's illegitimacy; but his principal crime was aſperſing the judges and juries who had concurred in the condemnation of *Burdet* and *Stacy*, two of his friends.

The king reſolved to make this blow at his brother's life as ſure as poſſible; thinking, perhaps, that the ſlightneſs of this accuſation of treaſon needed ſomething extraordinary to give effect to it; or becauſe the opinions of people had taken another turn upon this point of parliamentary juriſprudence: whatever was the motive, the king took the following meaſure; he directed the ſpeaker of the houſe of commons and his brethren to be called before the other houſe, where a re-hearing of the whole matter was had in their preſence. After this ſanction, it was thought the duke might be executed with ſafety; which was accordingly done *(a)*.

We do not find that any formal act was made to teſtify the concurrence of the whole parliament in this judgment of attainder: however, this precedent of calling in the houſe of commons to aſſent to a proſecution and ſentence, muſt have had a great effect towards encouraging them in maintaining this claim. The notions of what was law, and what was legiſlation, had become too well ſettled and diſtinguiſhed for it to be longer endured that the law ſhould be altered by any judgment leſs than a legiſlative act; or that any tranſaction ſhould have the force of an act, which was not aſſented to by the whole parliament. The commons had now riſen to ſuch importance by the repeated revolutions in the government, that they could be no longer overlooked. Theſe conſiderations had operated ſo far in the time of Richard III.

(a) 2 Parl. Hiſt. 373.

that

that he ventured to make no judgment by the aſſent of the lords alone, either on petitions in private matters, or in proſecution of offenders; but, in both caſes, the aid of the parliament was only to be obtained by a formal and complete act of the legiſlature. Theſe, from the particular occaſion of them, were called *private acts*. Several attainders, and ſeveral alterations in property, were made in the ſhort reign of that uſurper by theſe private bills; and this example was followed in the ſucceeding reigns. Thus have we ſeen the original judicature of parliament, which at firſt reſided in the king and lords, participated by the commons, and at length become a mere act of legiſlation: the remaining judicial authority which they ſtill retained, was that of a court of error, and of being their own judges in caſes of life and death.

Origin of private acts.

The court of chancery grew into great conſideration in the reigns of Henry VI. and Edward IV. Indeed the ſtatute 15 Hen. VI. may be conſidered as adding a new ſupport to this court; and, by reſtraining a wanton and inconſiderate application of its authority, to confirm a due and regular adminiſtration of juſtice there. That the legiſlature ſhould at different times expreſs a jealouſy of its new judicature by *ſubpœna*, and impoſe checks upon its exertion, is not to be wondered: the idea upon which this court had taken upon itſelf to decide according to equitable and general juſtice, was novel and adventurous. It was to afford relief to ſuitors, upon circumſtances of hardſhip, fraud, or truſt, where the king's courts allowed none. This was in effect an appeal from the ancient cuſtoms and ſtatutes of the realm, to the conſcience and diſcretion of a ſingle perſon. It appeared like changing the rules of right; like renouncing the government of law in matters of private concern, and preferring that of arbitrary will. Added to this, when it is conſidered that the chancellor preſided there alone, without the influence of common-law judges (except when he choſe to call in their advice) to controul the force of his own peculiar notions; that he was a perſon unlearned, for the moſt part, in the common-law; and an eccleſiaſtic, bred up, as was then uſual, in the knowledge of the civil and canon-law: from theſe conſiderations it was extremely probable, that, in a courſe of time, a ſet of rules and maxims of juſtice ſhould gain ground in that court, differing from, and derogatory to, the common-law. Theſe were natural apprehenſions, and in the event proved not to be wholly unfounded.

The court of equity in chancery.

Not only the education of the judge who there preſided, but the very intent and deſign of his juriſdiction naturally led to what was foreſeen. The

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canon and civil law furniſhed a ſyſtem of rules, and a courſe of proceeding, extremely well adapted to the objects of inquiry in a court of equity. The large principles of univerſal juſtice taught by the imperial law, were calculated for any ſet of people, and any ſtate of things. Theſe furniſhed grounds of reaſoning, to model, correct, and qualify the untoward conſequences of our partial municipal cuſtoms; while the eccleſiaſtical courts ſupplied a method of proceeding, in the examination of witneſſes and of the party, peculiarly contrived to ſift the conſcience of a deſigning and fraudulent defendant. The chancery being, like other courts, at liberty to form its own method of proceeding, adopted that which beſt anſwered its deſign; and accordingly, a proceeding formed from the civil and canon law together, gradually became the practice of the court of chancery, without any interference or controul of the legiſlature. But the chancellor was not left at liberty intirely to eſtabliſh the rules of juſtice dictated by the civil law. This was a matter of much more importance in its conſequences than the former. In this inſtance he was narrowly watched by the judges, who, in many caſes where their advice was called in, put ſome check on the liberal concluſions derived from thoſe plauſible topics, the fitneſs, and convenience, and the ſubſtantial juſtice of a cauſe, which were the principal grounds on which the chancellor reſted his equitable deciſions.

It is beyond a doubt, that this court had begun to exerciſe its judicial authority in the reigns of Richard II. Henry IV. and V. as appears from what has been before mentioned *(a)*. But we do not find in our books any report of caſes there determined till 37 Hen. VI. except only on the ſubject of uſes; which might give riſe to the opinion, that the firſt equitable judicature was concerned in the ſupport of uſes. Leaving uſes to be conſidered hereafter, we ſhall now take a view of ſuch points as were reſolved in this court during the reign of Henry VI. and the ſubſequent one; being the firſt notices we have in the annals of our law of the nature and progreſs of this new court of equity.

Caſes determined before the chancellor.

The following caſe was before the chancellor in 37 Hen. VI. A perſon bought up ſome debts owing to another, and gave him a bond to the amount. He now preferred a bill in chancery to be relieved from the obligation, alledging, that as the ſubject-matter of the contract were *choſes* in

(*a*) Vid. ant. 250.

action,

action, and therefore not transferrable, he had in reality received no conſideration, and ſhould therefore in conſcience be diſcharged from the obligation. The chancellor, having doubts, adjourned it into the exchequer-chamber, where it was agreed, with the concurrence of all the judges of the king's-bench and common-pleas, that the obligation ſhould be cancelled; and if the defendant refuſed, that he ſhould be committed to the Fleet till he complied (*a*). But when this matter was afterwards pleaded to the obligation ſued in the common-pleas, the plea was over-ruled, and the deed was conſidered as ſtill in force; it being conceived, that the only power the chancellor had of enforcing his decrees, was by inflicting impriſonment on the contumacious party, who might ſtill proſecute his legal rights in a court of law, notwithſtanding they had been determined in chancery to be unconſcionable. A grant was made, by letters patent, of goods forfeited by a perſon attainted; the grantee brought his bill in chancery againſt the perſon who had then the poſſeſſion of them, for this reaſon, that as the king could not have an action at law for the goods of an outlaw, or one attainted, before they had been ſeiſed for the king's uſe, or found by matter of record; much leſs could the grantee maintain a common-law action without having had the poſſeſſion. Accordingly it was held, that the *ſubpœna* was his only remedy; and the defendant was ordered to exhibit an inventory of the things the next day, on pain of being committed to the Fleet (*b*).

In the reign of Edward IV. the following points were determined: A man was bound in an obligation to *B.* for the uſe of *C.*; it was held, that in this caſe *C.* ſhall have a *ſubpœna* againſt the obligor (*c*). One coparcener would not count according to the truth, and in the ſame manner as the other coparcener had done; and there it was held a ſubpœna lay (*d*). Where a perſon had made another the procurer of his benefice, and had faithfully promiſed him (*e*) that he would ſave him harmleſs from the conſequences of holding it; when he afterwards reſigned it, and was vexed on account of the part he had acted, it was agreed, that a ſubpœna lay for ſuch indemnification: and it was there ſaid, If I promiſe to build you a houſe, and do not perform my promiſe, you have your remedy by ſubpœna (*f*). It was a doubt at this time, whether a ſubpœna would lie againſt an executor or heir; but it

(*a*) 37 Hen. VI. 13. Bro. Conſci. 4. (*b*) 39 Hen. VI. 26. b. (*c*) 2 Ed. IV. 2.
(*d*) 6 Ed. IV. 10. (*e*) *Promitta per fidem.* (*f*) 8 Ed. IV. 4. b.

ſeems

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ſeems after much debate agreed, that it would not lie againſt the heir of the feoffee, but he might hold the land diſcharged of the uſe; and the *ceſtui que uſe* was driven to ſeek redreſs in parliament (*a*). But where a man had made a fraudulent gift of his goods to avoid his creditors, and the perſon to whom they were given died, and they came to the hands of his wife; there, when a bill was filed againſt her, ſhe was compelled to anſwer it (*b*). And before that, it was decided in the following manner: *Worſley*, a baron of the exchequer, and one *Middleton*, bought ſome wool of Sir H. Wych, for which they bound themſelves in ſeveral obligations. Middleton had all the profits of the merchandize. Sir H. died, and made his lady his executrix; and by his will gave a longer day to Middleton. Upon this, Worſley brought his bill againſt the executrix, to diſcover what was owing, and to account; and the bill was held good; and that a bill might be brought to make a perſon ſhew his teſtator's will, and the truſt there declared (*c*).

A MAN was ſurety for another, who joined with others in a bond to ſave the ſurety harmleſs; afterwards the ſurety paid the money, and ſued the indemnity-bond: in the mean time, the firſt debtor brought his bill in chancery, and ſet forth, that before the bond was given to indemnify, he delivered certain goods to the ſurety, as a ſecurity for the ſame eventual burthen on him; and therefore he now prayed reſtitution of them, that he might not be doubly charged; and alſo he prayed an injunction; which latter was denied, upon the defendant in equity claiming a property in the goods (*d*). The cogniſor in a ſtatute-merchant had paid the money, without a releaſe; and the cogniſee, notwithſtanding this, ſued him at law: a bill being brought in chancery, it was a queſtion, whether he ſhould have relief? The chancellor had great doubt, and called in the aſſiſtance of the judges in the exchequer-chamber; where, after much argument, the chancellor was convinced, that, in the inſtance of a ſtatute-merchant, which is a matter of record, as the party need not have paid the money without a releaſe, it would not be conſiſtent with the rules of law to relieve; but as to obligations, which are matters *in pais*, that queſtion was left open to conſideration (*e*).

THE ſtyle of proceeding here was of a more liberal caſt than the pleadings in the other courts. It was held, that a perſon ſhould not be prejudiced for miſ-pleading, nor want of form; but if he proved ſuch matter as ſerved

(*a*) 8 Ed. IV. 6. (*b*) 16 Ed. IV. 9. b. (*c*) 9 Ed. IV. 41. (*d*) 16 Ed. IV. 9. (*e*) 22 Ed. IV. 6.

to

to aid him *in conſcience and equity*, it was ſufficient. The authority of this court was, as they expreſſed it, *ſecundum poteſtatem abſolutam*, and the chancellor made his decree *ſecundum allegata et probata*; while at common law they proceeded *ſecundum poteſtatem ordinatam* (*a*).

These were the advances made by the court of equity towards relieving ſuitors againſt the rigour of the common law. Its juriſdiction did not comprehend a great extent; and the exerciſe of it was feeble and imperfect. We ſee the chancellor ſeldom had a point of difficulty before him, but he called in the advice of ſome of the judges, or adjourned it into the exchequer-chamber, where it was diſcuſſed and reſolved according to the opinion of the ſages of the common law. This had the effect of ſettling this new juriſdiction on the ſound foundation of the law of the land, as it all this while grew up under the guidance and encouragement of the courts of common law. Owing to this ſtate of pupillage in which the court of equity was kept by the courts of common law, and the unfavourable compariſon it ſuffered when oppoſed to the antient judicatures of the realm, it appeared rather as tolerated in certain inſtances, than acknowledged as a part of the judicial eſtabliſhment of the kingdom.

The following fact is a ſtrong inſtance of the imbecillity of this court: In the 22d year of Edward IV. (*b*) after a verdict, an injunction was obtained, which had hung up the cauſe for ſome time: *Huſſey*, chief-juſtice, aſked the counſel for the plaintiff, if they would pray judgment according to the verdict; when they declared their apprehenſions about infringing the injunction. To this one of the judges ſaid, that as the injunction was againſt the plaintiff, yet his attorney might pray judgment with ſafety; and ſo *vice verſâ*. And *Huſſey* ſaid, that they had talked over the matter among themſelves, and they ſaw no miſchief which could enſue to the party, if he prayed judgment; for, as to the penalty of the injunction, they were convinced *it was not leviable by law*; and then there remained nothing but impriſonment: and as to that, the chief-juſtice ſaid, "If the chancellor commits "any one to the Fleet, apply to us for a *habeas corpus*, and upon the return of "it we will diſcharge the party; and we will do every thing to aſſiſt you." It is true, one of the juſtices ſaid, he would go to the chancellor, and aſk him to diſſolve the injunction: but this probably was ſuggeſted out of tenderneſs to the chancellor; for they agreed in declaring, that they would give judgment if the party would pray it, notwithſtanding the chancellor continued the injunction; but not damages for the loſs occaſioned by the proceedings in chancery.

(*a*) 9 Ed. IV. 15. (*b*) 22 Ed. IV. 37.

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It ſeems that the chancellor, beſides the aſſiſtance of the maſters in chancery, who properly compoſed his council, and were his ordinary aſſiſtants to ſit with him, and give their opinion when aſked; beſides theſe, he uſed alſo to aſſociate to him ſometimes peers and biſhops, but more commonly ſome of the judges. In conſequence of this, the decrees run, *Per curiam cancellariæ et omnes juſticiarios*; ſometimes, *Per decretum cancellarii ex aſſenſu omnium juſticiariorum et aliorum de concilio regis præſentium.* Again, *Ideò conſideratum eſt per curiam de aſſenſu Johannis Forteſcue, capitalis juſticiarii domini regis ad placita tenenda, et diverſorum aliorum juſticiariorum et ſervientium ad legem in curiâ præſentium.* Thus the form varied according to the perſon or perſons by whoſe aſſent the judgment or decree was made (*a*). From this we ſee, that the chancery ſtill preſerved ſome traces of its conſtitution in the time of Edward III. when references uſed to be made to the chancellor, treaſurer, *and others of the king's council in chancery.* This was the ſtate in which the authority of the court of equity in chancery ſtood at this period.

Of uſes.

We have already taken notice of the origin of uſes, in ſpeaking of the ſeveral ſtatutes that were paſſed for correcting the inconveniencies ſuffered from this new ſpecies of property. Notwithſtanding the diſtance of time ſince thoſe ſtatutes were made, there appears nothing in our books relating to *uſes*, till the reign of Henry VI. Though it is probable that a *proper uſe* was meant even by the ſtat. 50 Ed. III. and it is certain that property was well known in the reign of Richard II. and Henry IV. yet it is pretty clear, that *uſes* were not carried to any great extent, till the foreign wars of Henry V. and the civil diſſentions between the houſes of York and Lancaſter made it neceſſary to find out ſome method of conveying and concealing real property from the reach of legal demands. The expences and attainders which then threatened the nobility, made them reſort to uſes, as the moſt convenient method of ſheltering their lands from the conſequences of both.

We have now ſufficient lights to enable us to trace the ſteps by which *uſes* gradually aroſe, and took the form in which they afterwards appeared. So low down as the 7th of Henry VI. this kind of property was ſo little regarded, that we find it ſtated by one of the judges as a thing not allowed by law, and intirely void, if a man made a feoffment with a proviſo, that he himſelf ſhould take the profits (*b*). And it is not till the 33d year of

(*a*) Hiſt. Chanc. 80. (*b*) Hen. VI. 43. b.

the

the ſame reign, that judicial opinions ſeem to have altered in favour of theſe feoffments: for there, upon a queſtion of colluſive feoffment to the heir to avoid guardianſhip, it was agreed by the bench, that a feoffment to the heir and a ſtranger, and to the heirs of the ſon, was lawful, and no colluſion, on account of the intereſt of a ſtranger: again, if it was to the ſon to enable him to marry his daughter, or to pay debts, this was held good (*a*). And in all theſe caſes it was agreed, that a ſubpœna lay againſt the feoffees to perform the truſts: but it was held, if the feoffees in either of theſe caſes infeoffed another perſon, there was no remedy againſt the ſecond feoffee.

In the 37th year of this king, there is a caſe, which ſets forth the ſtate and application of *uſes*, and the courſe they were then in of being inforced in chancery. A man had ſignified his deſire that his feoffees ſhould make a feoffment to a perſon to whom he had ſold the land; and it was agreed in the exchequer-chamber, whither the cauſe had been adjourned, firſt, that the intention of the feoffor ſhould be declared by ſome writing, and not by a verbal meſſage; ſecondly, that where one deviſed by his will, that his feoffees ſhould make an eſtate for life to one, remainder to another, the remainder-man ſhould have a ſubpœna to eſtabliſh his eſtate, even in the life of the tenant for life. In the 4th year of Edward IV. (*b*) this kind of property is thus ſpoken of in the very language and terms which have ever ſince been applied to it: *A.* infeoffs *B.* to the uſe of *A*; here *B.* is ſeiſed of the land to the uſe of *A.* who only infeoffed him upon truſt and confidence: upon which ſeveral rights the court thus explains itſelf: "In the chancery, "a man ſhall have his remedy according to the intent of the feoffment, and "according to conſcience; but, in the common pleas, and in the king's "bench, according to the courſe of the common law it is otherwiſe; for "the feoffee ſhall have the land, and the feoffor ſhall have nothing againſt "his own feoffment, though it was only upon confidence."

It appears from hence, that the judges had qualified their notions concerning this new ſubject of property, ſince the beginning of the reign of Henry VI. when the ſtrict opinion before mentioned was delivered. Uſes had now been very well conſidered, and their properties and incidents recogniſed. So completely was a *uſe* conſidered as ſeparated from the land, that in this ſame year (*c*) it was declared, that a feoffment without any in-

(*a*) 33 Hen. VI. 14. Bro. Garde. 5. (*b*) 4 Edw. IV. 8. (*c*) 4 Edw. IV. 8.

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tent expreſſed, or if expreſſed to be to him and his heirs, ſhould always be conſidered as made to the uſe of the feoffor's will, and he might alter it whenever he pleaſed; except where it was declared to the uſe of a ſtranger, or the intent was to take back an eſtate tail; for, in theſe caſes, the intereſt of a third perſon was concerned, and it would not have been conſiſtent with conſcience to defeat it.

Their nature and properties.

THE properties of a uſe were ſettled in analogy to the law reſpecting land. It was to deſcend as the land would; it went to the younger ſon in Borough-Engliſh. If one ſeiſed *ex parte maternâ*, or ſeiſed in tail, with remainder over, infeoffed one to a uſe, the uſe deſcended as the land would have done; but it was not ſo of land held in right of the wife (*a*). There was a *poſſeſſio fratris* of a uſe (*b*). But where the *ceſtui que uſe* was attainted, and died without a will, the lord was not intitled to the uſe, nor was the heir; and it was thought it ſhould belong to the feoffees (*c*). The concluſions of the common law for a long time lay ſo ſtrongly in favour of the legal owner, that, if the feoffee died ſeiſed, his heir became abſolute owner of the land, diſcharged of the uſe; and this opinion prevailed till 14 Ed. IV. when the heir was held liable to a ſubpœna (*d*).

THE conſcientious diſcharge of the truſt repoſed in the feoffee was ſo regarded, that any ſtranger who became ſeiſed of lands by feoffment of the feoffees with notice of the uſe, was anſwerable to the *ceſtui que uſe* (*e*). A woman being *ceſtui que uſe* became covert, and was not allowed to command her feoffee to make an eſtate; for he by ſo doing, it was ſaid, would be guilty of a breach of truſt, and be committed to priſon by the chancellor (*f*); and under the like penalty, the feoffee was bound to maintain all ſuits incident to the freehold (*g*). Uſes were thus eſtabliſhed as a ſpecies of property diſtinct from the land out of which they iſſued; the land and the uſe were two independent ſubjects, and might reſide in different perſons. A gift of land by fine or feoffment without ſomething more, did not now, as formerly, convey any intereſt in the land; the uſe accrued only by the expreſs appointment of the feoffor, or upon ſome equitable right to it.

THIS is the height to which uſes had grown in the period of which we are now treating: their conſequences were carried much farther in the reigns of Henry VII. and Henry VIII.: already they had raiſed much jealouſy in the courts of common-law, and in the legiſlature. They were at firſt treated as

(*a*) 5 Ed. IV. 7. b. (*b*) 5 Ed. IV. 7. (*c*) Bro. Feoff. al Uſes, 34. (*d*) Fitz. Subp. 14. (*e*) 5 Ed. IV. 7. b. (*f*) 7 Ed. IV. 14. b. (*g*) 7 Ed. IV. 29. b.

no

no better than pretences to cover fraud, and were at length admitted, rather as abuſes which had taken deep root by ſufferance; and in that light the parliament at different times endeavoured to correct and reſtrain their irregularities, without attempting entirely to eradicate them. Indeed, uſes were pregnant with great inconveniencies. The poſſeſſion of land by *A.* to the uſe of *B.* was a concurrence of rights that could not fail of producing confuſion. *A.* the *terre-tenant*, as the lawyers called him, was poſſeſſed of the land by the forms of law, and ſo was its *legal* owner; but a confidence was repoſed in him by the giver of the eſtate, that he ſhould hold it to the uſe of *B.* for this reaſon called the *ceſtui que uſe*. Thus *B.* received the profits; was in conſcience and equity the owner; he enjoyed a credit and importance in the world by expending its produce, though the land was not liable to the engagements which he was enabled to contract by means of that credit and importance. Thus a kind of deceit was practiſed on mankind. To remedy this, occaſional expedients were applied, which were of ſome benefit in particular caſes; while the diſeaſe, ſtill vigorous, pervaded every part of the law of real property. The plan upon which theſe expedients were conceived was, to put the *ceſtui que uſe* into the ſame condition as if he was ſeiſed of the actual freehold by the ſolemnities of law. Such regulations, from the ſubject of them, are called the *ſtatutes of pernors of profits*, and have been already mentioned in their proper places.

Entails and remainders.

THE curioſities that had ariſen reſpecting entails and remainders made no ſmall part of the learning of this period. As to the limitations of remainders, the deſcription of heirs to take by purchaſe received this ſtrict conſtruction. If land was given for life, remainder to the heirs female of the body of *I. S.* who died, and left iſſue a ſon and a daughter, and the tenant for life died; in this caſe, the daughter could not have the land, becauſe ſhe was not complete heir in the ſon's lifetime *(a)*. In regard to the limitations of entails, it was held, that *heirs* without the word *body*, or *body* without the word *heirs*, was not ſufficient to make an entail *(b)*.

THERE ſeems to have obtained at this time a mode of transferring the freehold and inheritance by *releaſe* and by *confirmation*. A *confirmation*, as the name implies, was deſigned to ſubſtantiate a defeaſible eſtate, which had been obtained either by right or by wrong; and therefore it was rarely, if ever, made in concurrence with the party who gave riſe to the imperfect intereſt

(*a*) 9 Hen. VI. 23. Bro. Tail. 3. (*b*) Ibid.

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which it was meant to confirm. But a *releaſe*, though applicable to divers caſes, where it was certainly made upon an after-thought, as to enlarge and confirm ſome pre-exiſtent eſtate; yet was not unuſually adopted as an original conveyance, for the transfer of the freehold and inheritance. The way was this: A deed of *leaſe* was made to the party intended to be the purchaſer, for three or four years; and when he had entered on the poſſeſſion, immediately, or very ſoon after, a *releaſe* of the inheritance was ſealed to him, and thus he became ſeiſed as completely as if by fine, or feoffment with livery of ſeiſin (*a*). Thus a leaſe and releaſe were practiſed as a full transfer of the freehold and inheritance. This, as well as a feoffment to a uſe, was a deviation from the common-law conveyances, which, we ſhall ſoon find, began to give place to theſe and other new modes of transfer, grounded upon the doctrine of uſes. One great motive to the creating of uſes, namely, the ſecrecy of the tranſaction, was principally ſtudied in framing theſe new conveyances; by means of which the land, or at leaſt the equitable right to it, could be ſold, without the notoriety of feoffment and livery of ſeiſin.

THE diſtinction between gifts of land by deed and by will became more ſtrongly marked; for though, in the former caſe, if the tenant of the particular eſtate refuſed to accept the livery, the remainder was void; yet, if the firſt deviſee refuſed, the remainder was ſtill good, and he took in poſſeſſion immediately (*b*). Another diſtinction was this: If land was given to a man and the heirs male of his body, and he had iſſue a ſon and a daughter, and died; the ſon entered, and the daughter had iſſue a ſon, and died; and then the donee died without iſſue male; here the ſon of the daughter was not to have the land, though he was heir male; but if it had been by deviſe, he would (*c*). And ſo of a deviſe by a man to *I. S.* for life, remainder to his heirs male, and to the heirs male of their body; he died; *I. S.* had iſſue a daughter, who had iſſue a ſon; and *I. S.* died: it was held, that the ſon of the daughter ſhould have the land; and this was, becauſe the will of the deviſor ſhould be fulfilled (*d*).

A NOTION had begun to prevail reſpecting the deviſe of a chattel, which was entirely novel. A gift of a chattel, without any ſpecification, or if for life, was heretofore conſidered as a gift for ever; a chattel not being reſpected by the law in the light of ſuch permanent property as might be limited over from one to another, after the death of the poſſeſſor. But at

(*a*) 32 Hen. VI. 8. (*b*) 3 Hen. VI. 4. b. 37 Hen. VI. 37. (*c*) 27 Hen. VI. 8. Bro. Deo. 5. (*d*) 11 Hen. VI. 12. Bro. ibid. 32.

length

length the following method was hit upon, by which a chattel might be bequeathed over, in like manner with real property. It was held, that a man might give, by will, a book to one of his executors, *to have and uſe* for the term of his life; remainder to his other executor, to have and uſe for the term of his life; and then to the pariſhioners of ſuch a pariſh. The reaſon of this opinion was, becauſe only *the uſe* was given for life; and therefore a ſort of remainder over might be reaſonable and conſiſtent therewith. This is the origin of that ſort of gifts which in later times have been called *executory deviſes (a)*.

An executory deviſe.

THESE determinations were in the ſpirit of the ſtatute *de donis*, and tended to encourage the limiting eſtates in perpetuity. However, the ill ſucceſs of ſome attempts that were made to refine on the reſtrictions of that ſtatute, and the manner in which ſuch attempts were treated by the courts, ſhew that ſome doubts began to be entertained concerning the wiſdom and policy of long entails. We are told (*b*), that in the reign of Richard II. *Richel*, a judge of the common pleas, having iſſue many ſons, made a ſettlement on them in tail, one after another; with a condition, that if any one of the ſons aliened in fee, or in tail, then his eſtate ſhould ceaſe and be void, and the land ſhould immediately remain to the next in the entail; a condition, which became now neceſſary for thoſe to make, who apprehended the conſequences of the judgment in *Octavian Lumbard*'s caſe, determined in the reign of Edward III. and which they expected would ſtill be thought deſerving the ſupport once given to entails. But that inclination was gone off, and this new device of the judge was declared void by the court of common pleas in the 2d year of Henry IV. A like ſettlement made by Juſtice *Thirning (c)*, in the reign of Henry IV. was alſo ſolemnly adjudged bad, in the 21ſt year of Henry VI. It is not enough to ſay, that entails were no longer favourites in our courts; for Littleton gives three very learned reaſons why the limitations above mentioned were ſubſtantially void in law, in their original creation. Firſt, becauſe a remainder that commences by deed, ought to veſt in him to whom it is limited, when livery of ſeiſin is made to him, who has the particular eſtate. Secondly, becauſe if the ſon alien in fee, the fee ſimple and freehold is in the alienee, and in none other; how then can ſuch remainder commence, immediately after the alienation to a ſtranger? Thirdly, becauſe upon the breach of the condition the donor ought to enter, and not he in the remainder,

Perpetuities declared void.

(a) 37 Hen. VI. 30. Bro. ibid. 13. (b) Litt. ſect. 720. (c) 1 Inſt. 377. b.

who

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who is no party to the condition: for all which reaſons, this new invented perpetuity, ſays he, was legally void (*a*).

But it was not ſufficient to repreſs theſe extravagant refinements on entails. The ſtatute *de donis* ſtill operated with great force on landed property; and it was thought expedient to contrive ſome method of a general nature, which ſhould have the effect, in ſome meaſure, of a repeal. In the courſe of the long contention for power between the houſes of York and Lancaſter, ſome temporary motives might contribute to promote ſuch an attempt. An impoveriſhed gentry, and a nobility exhauſted by the expences of the field, were eager to obtain a power of exchanging the ſlow produce of their inheritances for the common medium which was current every where, and which could now be procured from a commons daily increaſing in riches by the cultivation of foreign and domeſtic trade. But this was not the only cauſe. To perſons of unembarraſſed circumſtances, to whom money afforded no temptation, a full dominion over their own property, if not a deſire to alien, was extremely grateful. Theſe were as much inclined as the former to avail themſelves of any legal means of enlarging that dominion: to ſuch, the poſſeſſion of a clear fee-ſimple was far preferable to land, if under the tie and incumbrance of an entail; the owner might then ſatisfy his caprice in the full management and diſpoſal of it, regardleſs how it lay open to the forfeitures and penalties which the law might inforce on property not entailed. This was at length effected in the reign of Edward IV. and we ſhall now conſider the ſteps which led to this important event.

We have ſeen (*b*), in the reign of Edward I. that the clergy had invented a method of conveying in mortmain, by means of a *feigned recovery*, upon a *præcipe quòd reddat*, &c.: that practice was ſoon ſtopped by the interference of the legiſlature. But it cannot be imagined, that the memory of ſuch a practice, tho' declared illegal in a particular inſtance, ſhould have been intirely loſt, eſpecially when a notice of it was recorded in an act of parliament. It is not eaſy to ſay, whether a recovery on a *præcipe* did or did not continue to be uſed, where a fee-ſimple was to be transferred, either as a ſubſtantive mode of conveyance, or as an additional aſſurance to ſecure the title; at leaſt, there is no mention in our books of a feigned recovery till the reign of Henry VI. It appears, that about the beginning of that reign, this antient device of the clergy had been again recurred to;

(*a*) Litt. ſect. 721, 722, 723. (*b*) Part I. 403.

and

and tenants in tail, who wanted to get rid of the entail and ſell their land, had conceived that they might ſafely convey under the ſanction of a pretended recovery againſt them on a *præcipe quòd reddat*, &c.; for this being a ſolemn judgment, and ſuppoſed to be upon a right tried, the iſſue, who could have no better title than their anceſtor, muſt acquieſce in the ſame judgment which barred him. Of this opinion was the court in the 3d of Henry VI. A writ of right was there brought againſt the tenant in tail; and upon the defendant making default, the court ſhewed great reluctance in paſſing judgment, becauſe, ſaid they, it will bar the iſſue (*a*).

Recoveries to bar entails.

An opinion ſo explicit as this, was enough to encourage this application of a recovery upon a *præcipe*. This ſeems delivered as a common point of learning, and probably nothing more than was generally admitted, and the very object perhaps the parties to that ſuit had in view. However, this continued, like many other prevailing notions which have not received the ſanction of a judicial determination, without a very general effect; and the conſequence of a feigned recovery barring an eſtate tail, was not a ſettled and eſtabliſhed point of law; for in 7 Hen. VI. (*b*) it was ſaid, if a tenant in tail loſe by *falſe plea*, his iſſue may have a formedon againſt the demandant. But notwithſtanding what was held reſpecting this *falſe plea*, it was contended as a thing of courſe, in 37 Hen. VI. that a recovery *by default* in a writ of right might be pleaded in bar of the iſſue in a formedon (*c*). This was not allowed by the counſel on the other ſide, who ſeem notwithſtanding to agree, that ſuch a recovery might bar all meſne charges, but not the iſſue, for they claimed paramount. It does not appear what judgment was given; for the cauſe was adjourned. This proves, that whatever the practice might be, there was, at leaſt, a difference of opinion concerning this point, in the reign of Henry VI.

Taltarum's caſe.

Nothing more is heard of recoveries to bar entails till the famous caſe of *Taltarum*, in 12 Ed. IV.; a caſe which has always been conſidered as cloſing this queſtion: not that the court there directly decided the point; but, while they determined in that caſe *againſt* ſuch a recovery *improperly* ſuffered, they ſeemed to admit, that a like recovery *properly* ſuffered would bar the iſſue in tail. The caſe was this: In a writ of entry on ſtat. 5 Ric. II. the defendant conveyed to himſelf a title under an entail: the plaintiff replied, that one *Taltarum* brought a writ of entry againſt an anceſtor of his, returnable at ſuch a day; that the parties appeared, and Taltarum counted

(*a*) 3 Hen. VI. 55. b. Bro. Tail. 30. (*b*) 7 Hen. VI. 39. (*c*) 37 Hen. VI. 31. b.

againſt

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againſt him of his own poſſeſſion; that the tenant made defence, and vouched to warranty one *King*, who was ready, and entered into the warranty, and the miſe was joined on the right: that Taltarum imparled, and afterwards came into court; and the vouchee came not, but in contempt made default; upon which the demandant had final judgment againſt the tenant in tail, and he over againſt the vouchee; by force of which recovery Taltarum entered, and infeoffed the plaintiff. In this manner is the recovery pleaded. The defendant rejoined, that all this might be true; but that before the recovery by Taltarum, the tenant in tail had infeoffed another, who had re-infeoffed him in tail. Upon theſe pleadings the following queſtion aroſe: Whether the defendant who claimed under the firſt entail, was barred by a recovery ſuffered by his anceſtor at the time he was ſeiſed of a later entail, created ſince? This was the point before the court. In debating the matter, ſomething was ſaid on the effect of a recovery, which they all conſidered as a bar; and, it ſeems, they reſted the reaſon of its being a bar intirely upon the recovery in value againſt the vouchee. Further, it was ſaid by one of the judges, that an entail cannot be barred by a recovery in value, unleſs that which is recovered go in the place of the other; and that cannot be, unleſs the recovery in value be againſt the *donor*; and in ſuch caſe it was a ſettled point, if *A.* give land to *B.* in tail, and he recover in value againſt *A.* the iſſue of *B.* ſhall have a formedon of the land ſo recovered. Conſiſtently with this, as the recompence goes to that iſſue only who loſes the eſtate, the defendant in the caſe in queſtion, who claimed under an entail of which the tenant was *not ſeiſed* at the time of the recovery, could be intitled to no recompence in value, and therefore could not be barred by the recovery.

In debating the effect of a bar by a recovery, the court confined itſelf to the ſtricteſt technical reaſoning. Upon the principle which had been admitted in *Octavian Lumbard*'s caſe (*a*), and recogniſed in ſome others, both in the reign of Edward III. and ſince, they conſidered a recompence to the iſſue as a ſufficient reaſon for depriving him of his eſtate; and a recompence in value to the recoveree being part of the judgments in a recovery on a *præcipe*, this proceeding was, in its very frame, happily adapted to the purpoſe. A recovery ſeems to have forced itſelf upon the courts, who recogniſed its effects no further than they were obliged by the legal circumſtances attending it. Their deciſion in this caſe was intirely conformable to the exact requiſite of the proceeding; for they expected, as was before obſerved,

(*a*) Vid. ant. 136.

that

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that the vouchee ſhould be the real and true donor, who had actually engaged to warrant upon the original gift of the land (*a*).

THESE were the grounds upon which a recovery was explained and ſupported, when it was ſuppoſed, or at leaſt pretended, to be a real proceeding. In after-times, when it was conſidered merely as fictitious, for the purpoſe of barring eſtates tail, the ſame language was adhered to, as the beſt way of reconciling it to reaſon and to law. But ſurely, without recourſe to theſe technical arguments, the application of a recovery to the purpoſe of barring entails, may be defended on other grounds equally conſiſtent and legal. Why ſhould it not be at once ſaid, that the recoveror recovers the land by better title? a fiction, ſurely, as fair as that of a recovery in value to the iſſue. As this is the plain ſenſe of it when the *præcipe* is brought againſt a tenant in fee, why ſhould it not, and be ſo avowed, when brought againſt a tenant in fee-tail? It ſhould ſeem, that a ſhort conſideration of the ſtatute *de donis* will render ſuch an apology as the inference drawn from a recovery in value, perfectly unneceſſary. That act was intended to bind up the hands of the tenant in tail from prejudicing his iſſue; but not to preclude third perſons from purſuing their lawful claims againſt the land entailed. It could not be ſaid, as in oppoſition to *their right*, that the will of the donor ſhall be obſerved. That ſtatute provided only againſt *voluntary* alienations, and, among others, declares, that a fine levied of ſuch entailed land ſhall be void; a fine being at that time an amicable ſuit for the ſingle purpoſe of transferring the poſſeſſion and right of land. But to all involuntary alienations, to all recoveries by right, ſuch land entailed was ſtill liable, notwithſtanding the ſtrict reſtraint on alienation by the owner. A *præcipe* was then an adverſary ſuit; and, tho' the churchmen had about that time converted it to its preſent uſe, even then, if a recovery was had thereon, it carried with it the pretence of a recovery by lawful title, and bound only as ſuch. When it came into more general uſe, it ſtill bore its original import; and under all conſiderations of it, with regard to the recoveror, recoveree, and the thing recovered, will bear no other comment or concluſion, but that the recovery was had by lawful right, regularly divided upon. The ſtatute *de donis* had not taken away ſuch a mode of alienation; and, of courſe, an eſtate tail, in its very origin, was liable to be barred by a recovery in a judicial proceeding.

(*a*) 12 Ed. IV. 15. 19, 20, 21.

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WHATEVER may be the true reaſons upon which this adjudication is to be explained, this is certain, it had a more extenſive influence than almoſt any thing that ever came from the courts at Weſtminſter, reſpecting private rights. It made an epocha in the hiſtory of landed property. It had the effect, in a great meaſure, of repealing the ſtatute *de donis*; for after this, every tenant in tail had a power of barring his iſſue, and thoſe behind in remainder; not by compenſating them with a real equivalent, as was required upon the principle of Octavian Lumbard's caſe, but by the ſuppoſed and ideal recompence of a recovery in value againſt the common vouchee. The ſtatute had no longer any force but to enable perſons to make entails, with long ſubſtitutions of remainders, which could not have been created at common law, and which every tenant, as he came into poſſeſſion, had the power of deſtroying by ſuffering a recovery; a power which was moſt commonly exerciſed as ſoon as the party was of years to do a legal act.

Actions of aſſumpſit.

THE law concerning *promiſes*, which had been ſo repeatedly canvaſſed in the reign of Henry IV. was again brought forward; and the courts ſeemed now inclined to ſettle it upon the footing on which it has been underſtood ever ſince (*a*). In the 3d of Henry VI. the diſtinction above taken between a non-performance and a negligence or malfeaſance, was denied (*b*); and it was there ſaid, that an action would lie as well on one as the other. Again, this point was more thoroughly conſidered in the 21ſt of Henry VI. in the caſe of *Talbois and Sherman*. The plaintiff had there bargained with the defendant for two pipes of wine, which the defendant was to deliver at a certain time and place: this he did not do, and the plaintiff brought his action againſt him. It was objected, that the action was wrongly conceived, and that it ſhould have been *debt*, or *detinue*: others argued, that it ſounded in *covenant*, and therefore muſt fail for the reaſons given in thoſe caſes in the time of Henry IV.; and the opinions there delivered were now reſorted to, as authorities againſt this action. But the court ſeemed now to think otherwiſe; for *Aſcue* ſaid, if one agrees (*c*) with a ſurgeon to attend him, and he does not, he may have treſpaſs upon the caſe againſt him, for not performing his agreement: and *Paſton* ſaid, If I come into a town, and offer a ſmith money to ſhoe my horſe, and he refuſes, and my horſe goes lame, I may have an action on the caſe againſt him. Theſe poſitions were all of them in direct oppoſition to what had been urged from the caſes in the time of Henry IV. namely, that ſomething ſhould have been *done* to execute the

(*a*) Vid. ant. 298. (*b*) 3 Hen. VI. 36. (*c*) *Covenants.*

contract,

contract, and then the action would lie for omiſſion and negligence: and when that authority was objected, *Aſcue* anſwered, that the action would lie againſt the ſurgeon, tho' *no* medicine had been adminiſtered: however, there was no deciſion in this cauſe, for the parties came to an agreement. Notwithſtanding this, it ſufficiently appeared from what was thus thrown out, that the opinions upon this queſtion were now changed; and they began to think, that in an action upon the caſe, damages might be recovered for not performing an *executory agreement*. In 22 Hen. VI. it was ſaid by *Newton*, that if I ſell my land to you, tho' no feoffment be made, yet I may have an action of debt againſt you; and you have nothing but an action upon the caſe againſt me; taking it as a ſettled point. And this is the lateſt mention we find of any thing concerning this ſort of action, during this period.

THUS was the action upon the caſe by degrees adapted almoſt to all purpoſes; ſometimes as a remedy where the common law before furniſhed none, and ſometimes in the place of the old-eſtabliſhed actions, which were found leſs adequate than this to obtain the ends of juſtice. It was the uſual mode of redreſs in moſt inſtances of *malfeaſance* or *negligences*, whether of private perſons or of thoſe in office; and the party received a recompence in damages for the wrong ſuſtained. Numerous are the inſtances in which this action had already been applied to; the reports of which have come down to us. Theſe afforded a ground-work to extend it by a reaſonable analogy to all the conſequences which have ſince been built upon it (*a*): ſo that the ſpecific writs before in uſe, as the writ of deceit, of conſpiracy, and others, began gradually to go out of practice; and actions upon the caſe, of a liberal conception, were framed in the nature of thoſe remedies. It only remained to give efficacy to theſe actions of *aſſumpſit* (or compelling the performance of executory promiſes) as a ſubſtitute for the action of debt, and to *trover* as a ſubſtitute for that of *detinue*; after which, the method of legal redreſs in regard to perſonal injuries, will have ſuffered a complete revolution. During this period the ſteps above recounted were made towards effecting this change.

SOME opinions began to prevail reſpecting the effect of the writ of *ejectione firmæ*, which led to as great a change in real remedies. In the reign of Edward III. and again in that of Richard II. we find it expreſsly laid down, that an *ejectione firmæ* was, in its nature, only an action of treſpaſs; and that

Ejectione firmæ.

(*a*) 11 Hen. IV. 82, 83. 8 Hen. VI. 1. 21 Hen. VI. 5. 22 Hen. VI. 14. 21. 38, &c.

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the plaintiff therein could no more recover his term unexpired, than he could in treſpaſs recover damages for a treſpaſs not committed; and that the only remedy for the term was in covenant againſt the leſſor (*a*). This was the opinion of the whole court. But in the reign of Edward IV. it ſeems to have been held differently; for there it is ſaid, in argument, that in *ejectione firmæ* the plaintiff ſhall recover what remains *unexpired* of his term, as alſo damages for the time it was with-held from him (*b*). This was only a *dictum*; but we ſhall ſee, that in the reign of Henry VII. it was ſolemnly ſo determined. In conſequence of that deciſion the action of *ejectione firmæ* became more frequently uſed, as a ſubſtitute to the many real writs for recovering poſſeſſion and trying titles to land.

Pleading.

THE ſcience of pleading, in all actions, and in all its branches, makes a very diſtinguiſhed feature in the learning of this period, particularly of the laſt twenty years of Henry VI. and the reign of Edward IV. Whatever induſtry and whatever ingenuity had been exerciſed in adjuſting the conſtitution and conduct of real actions, in the reign of Edward III. ſeems to have been transferred to pleading; which ſucceeded, as it were, to that antient branch of learning like a deſcendant of the ſame family. Every thing which concerned the frame and proceedings of actions was now agitated, and refined upon, with the greateſt dexterity and ſkill. The writ, the declaration, the conſequent pleadings, the proceſs, the judgment; all theſe were debated under every poſſible conſideration, and the forms and courſe of them ſettled upon ſolemn deliberation.

PLEADING had become ſo much the faſhionable ſtudy, and conſtituted ſuch an eſſential part of the qualifications of a lawyer, that *Littleton*, in the reign of Edward IV. pronounces it to be "one of the moſt honourable, "laudable, and profitable things in the law, to have the ſcience of well "pleading in actions real and perſonal;" and therefore he adviſes his ſon "eſpecially to employ his courage and care to learn it (*c*)." The reports of the time of Henry VI. and Edward IV. are full of points of pleading, which are ſtarted in one ſhape or other, in almoſt every queſtion debated in court. Pleading was cultivated with ſo much induſtry and ſkill, that it was raiſed to a ſudden perfection in the courſe of a few years. Almoſt every thing ſubſtantial in pleading, which has been practiſed from that time to the preſent, was ſettled by judicial determination in the reigns of theſe kings.

(*a*) Fitz. Eject. 2. (*b*) 7 Ed. IV. 6. b. (*c*) Litt. ſect. 534.

When

When ſo much anxiety was diſcovered in cultivating this branch of ſtudy, it was impoſſible almoſt to avoid ſome of the faults which were before complained of in the lawyers of Edward the IIId's time. It cannot be denied, that the pleaders of theſe times gave into much refinement, raiſing debates about verbal formalities, as points of the greateſt moment; and ſuch was the humour of the age, that this captiouſneſs was not diſcoutnanced by the bench. When the philoſophy of the times was a war of words, it is not to be wondered that a learned profeſſion ſhould pay too great a regard to laborious triſles. The calamity has been, that after other branches of knowledge took a more liberal turn, the minutiæ of pleading continued ſtill to be reſpected with a ſort of religious defe rence.

While we acknowledge ourſelves indebted to theſe times for reducing to a ſcience the plain and ſenſible logic of maintaining and defending a ſuit in a legal form; it cannot but be lamented, that they ſuffered to creep into it, at the ſame time, certain peculiarities which gave it too much an air of myſtery.

It would be beyond the bounds of this work to enter into a ſatisfactory account of the improvements made in pleading during this period; and pleading conſiſts of ſo many unconnected particulars, that, perhaps, of all other parts of the law, it will leaſt ſubmit to a ſummary relation. Under theſe difficulties, and conſidering how much is ſaid on this ſubject in the reign of Edward III. we may content ourſelves with remarking, that pleading in general aſſumed that character in all actions, which it has preſerved ever ſince; with this moſt ſtriking difference, that at this time a defendant ſeldom failed to plead ſome ſpecial to the action, and that even general iſſues rarely ſtood ſingly, but were preceded by ſome ſpecial inducement, upon which the general denial was meant to be reſted. In other reſpects, almoſt all the actions then in uſe were declared and pleaded in the preſent ſtile of pleading, except only actions upon the caſe. It was natural, in forming the manner of pleading in caſe, that they ſhould look to that action from whence it originated, and to which it bore a ſtronger ſimilitude than to any other, namely, the action of treſpaſs. Conſiſtent with that model, they ran into a length of ſpecial juſtifications, which produced replies, rejoinders, and the ſubſequent pleading before they came to an iſſue.

We have ſeen in the reign of Edward III. that a practice had obtained of commencing actions by bill in either of the three courts in Weſtminſter-hall but nothing has yet been ſaid on the nature of that proceeding, as

the

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the books obſerve a ſilence therein, till the reign of Henry VI. when there happened ſome caſes which ſhew that ſuch bills in the king's bench uſed to charge the defendant as *in cuſtodiâ mareſchalli*, intimating that circumſtance to be the foundation for the proceeding. It ſeems, that the perſons in the cuſtody of the marſhal of that court might be declared againſt by bill for any cauſe of perſonal action, notwithſtanding the prohibition of *Magna Charta*, which was conſtrued not to extend to this privilege claimed againſt priſoners. The court, however, guarded this cuſtom, which it had ſuffered to obtain, by a ſtrict adherence to the notion of law on which it originated, namely, that the perſon was an actual priſoner of the court.

Of proceeding by bill in the king's bench.

Thus in 7th of Hen. VI. where a man was out on bail, it was held (*a*), that a bill could not be filed againſt him as in cuſtody; beſides, it was required that there ſhould be ſome proof on record of his being in cuſtody (*b*); for otherwiſe it was ſaid, it lay at his option whether he would plead to the bill. Many devices were contrived to effectuate this requiſite of cuſtody; one of which ſeems to have been the exhibiting of articles of the peace (*c*): ſo ſtrenuouſly did they endeavour to preſerve the proper character of this tribunal as a criminal court. However, in 31 Hen. VI. they ſeem to have relaxed a little on this point. It was then held, that if it appeared that a perſon was out on bail, *that* of itſelf was ſufficient ground to the court to proceed againſt him as in cuſtody, whether the cauſe of his commitment appeared or not. Thus the ground of the court's juriſdiction became a fiction, and the king's bench began to entertain ſuits againſt perſons who were only ſuppoſed to be in cuſtody, provided there were ſome ſlight grounds to warrant the ſuppoſition. It was ſufficient therefore to arreſt the defendant by a bill of Middleſex or *latitat*, who gave bail to appear; and then, tho' out of cuſtody on bail, he ſtill became liable to plead to a declaration filed againſt him in any action; and this became the ſettled practice towards the latter end of the period of which we are now writing.

When the proceeding in this court by bill was rendered ſo eaſy, it may be ſuppoſed that ſuits of every kind were brought here in that way very frequently, and that the civil buſineſs of the court began conſiderably to increaſe. The number of actions upon the caſe, which too could be brought by original here, increaſed the ſubjects of judicial cogniſance in this court to a nearer

(*a*) 7 Hen. VI. 42. (*b*) Ibid. 41. (*c*) Ibid.

proportion

proportion with thoſe of the common pleas than it had ever before exhibited.

In the reign of Edward IV. ſome caſes of larceny happened, which created ſuch diſcuſſions as laid open the learning upon that ſubject very fully. A man was indicted for feloniouſly taking and carrying away a box with charters in it: and there it was ſaid, that it was no felony, becauſe charters are *realty*, and not chattels real, which was proved by a felon forfeiting his chattels real, under which deſcription go a term for years, or a guardianſhip, but not his charters; to which all the judges aſſembled in the exchequer-chamber aſſented; and in that caſe the box was adjudged to follow the nature of the charters. It was at the ſame time laid down for law, firſt, that larceny could only be committed of *chattels perſonal*; and ſecondly, in reſpect to the ſort of taking neceſſary to conſtitute larceny, it was held, that where a perſon entruſts goods to the care of a ſervant, the ſervant cannot take them feloniouſly, becauſe they are in his poſſeſſion (*a*). A caſe ſomewhat allied to this laſt, was debated afterwards with great anxiety before the council in the 13th year of the ſame reign. One had bargained with a man to carry certain bales of goods to Southampton. The man took the parcels, carried them to another place, broke them open, took out the goods, and converted them to his own uſe. Whether this was in law a larceny, was debated with much difference of opinion. It was argued, that here a poſſeſſion of the goods was given by the bailment of the owner; and neither felony nor treſpaſs could be committed of them by the baillé; for he could not be ſaid to take them *vi et armis, & contra pacem.* On the other ſide it was ſaid, that a man's act becomes felony or treſpaſs according to the intent. If a man abuſes a diſtreſs, he is a treſpaſſor, and ſo here all confidence implied in the bailment was ſuperſeded by the taking, which diſcovers his intent to have been bad from the beginning. It was alſo ſaid, that this was different from a bailment; for it was only a *bargain to carry*; and what followed, ſhews that this was only a pretence to gain an opportunity for ſtealing. At length, one of the juſtices had recourſe to a refinement, which admitted ſome of the above reaſoning, but diſtinguiſhed this caſe from it: he admitted, that a man who has the poſſeſſion of goods by bailment, cannot commit felony of them; but here, he ſaid, the *goods* within the parcels were *not* bailed to the carrier, but the *parcels themſelves*; and therefore taking *them* was not felony; but when he broke them open,

(*a*) 10 Ed. IV. 14.

and

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and took out the *goods*, he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for inſtance, if you deliver a tun of wine to a carrier, and he ſells it, this is neither felony nor treſpaſs; but if he takes any out of the tun, and ſells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes any thing out of it, this is felony: and the reaſon of theſe caſes is, that the things not ſpecifically and expreſsly delivered, were not in truth bailed, and therefore the party, in *taking* them, intermeddles where he had no truſt.

THESE were the arguments uſed before the council: the cauſe was afterwards adjourned into the exchequer-chamber, and the opinion of all the judges was taken. There it was agreed by all the judges, except one, that generally where goods are bailed to another, he cannot take them felonioufly. They held alſo, that when a poſſeſſion ſo obtained has once determined, then the baillé may in law commit felony in taking them; as, if I bail goods to a man to carry them to my houſe, which he performs, and afterwards takes them, it is felony, as his poſſeſſion under the bailment ceaſed when he delivered them at the houſe. They agreed ſome points upon the nature of poſſeſſion. If a gueſt in an inn takes a cup, he is a felon, becauſe he had not properly a poſſeſſion, but only the uſe of it while there. The ſame of a cook or a butler in my houſe; they are only miniſters as to the things within their care; but have no poſſeſſion, which, in theſe caſes, is always conſtrued by the law to be in the maſter. But it would be different, perhaps, ſays the book, if goods were *bailed* to a ſervant; for as they then would be in the actual poſſeſſion of ſuch ſervant, he could not commit felony of them.

UPON the whole, as to the principal caſe, whether it was agreed, that the bailment ceaſed upon breaking the parcels open, and the carrier thereby forfeited the legal privileges annexed to him as baillé, and in ſo taking the goods he was conſidered as a common perſon; or whether it was upon the whole thought, that this was not a bailment, but merely a bargain to carry; it is not ſtated in the report, which of theſe grounds they determined on; but it was certified to the chancellor by the major part of the juſtices, that this man was guilty of felony (*a*).

IT was, in a few inſtances, defined what kind of property was ſubject to larceny. Fiſh in a pond, as well as in a trunk, young goſhawks, and pigeons which cannot yet fly, and ſo are at the will and controul of the owner; to

(*a*) 13 Ed. IV. 9. 10.

ſteal

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ſteal any of theſe was conſtrued to be larceny; but otherwiſe of the ſame animals when full grown, and therefore in a great meaſure at liberty (*a*). In ſhort, it was held, that only ſuch things in which a man has a *property* could be feloniouſly taken and carried away (*b*).

THE old maxim of our criminal law, that *voluntas reputabitur pro facto*, continued to prevail in the reign of Henry IV. For then *Shard* agreed with *Gaſcoigne*, that if a man was indicted, that *il giſoit deprædando*, it was felony; Thus, ſays he, if a man comes to rob me, and I am ſtronger than he, and overcome him, yet is he guilty of felony (*c*). But this opinion now began to grow obſolete; for in 9 Edward IV. we find a contrary language. There *Jenny* ſays, that if one lies in wait in the road, with his ſword drawn, to ſet upon a man, and demands his money, and a hue and cry is levied, and the man is taken, yet it is *not* felony (*d*). This was the ruling opinion upon which the law began to ſettle; and men were no longer puniſhed for crimes which they only meditated, but had not actually committed.

King and government.

THERE is no mention that the kings whoſe reigns we have now been reviewing made any particular proviſion for the improvement of our law, or ſhewed any remarkable regard for it, unleſs the following facts related of Edward IV. may be taken as ſuch. It is ſaid by the writer of the hiſtory of Crowland Abbey, that this king went in perſon with the judges to try criminals in different parts of the kingdom; *nemini, etiamſi domeſtico ſuo, parcens, quo minus laqueo penderet, ſi in furto vel latrocinio deprehenſus fuerit* (*e*). We are told alſo, that in the ſecond year of his reign he ſat three days together, in Michaelmas term, in the court of king's bench; to which attendance he was excited by a ſtrong deſire, it is ſaid, to underſtand the law (*f*).

UPON the whole, the law was left to itſelf to maintain its ground as it could, amidſt the convulſions which the nation underwent during great part of this period. During the reign of Richard II. the dignity of the law, together with the honour of the kingdom, through the weakneſs of that prince, and the difficulties occurring in his government, ſeemed ſomewhat to decline (*g*). When the law had taken this unfavourable turn, it required every encouragement from the ſettled ſtate of things in the reigns of

(*a*) 18 Ed. IV. 8. (*b*) 22 Hen. VI. 59. Bro. Coron. 190. (*c*) 13 Hen. IV. 85. (*d*) 9 Ed. IV. 28. (*e*) Gale, Vol. I. 559. Bar. Stat. 419. (*f*) Truſſ. Cont. of Dan. 184. Bar. ibid. 429. (*g*) Hale's Hiſt. 174.

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Henry IV. and V. to recover itſelf. This it effectually did; and it began then to flouriſh with a ſtrength and beauty unknown to it in former times, which enabled it to withſtand all ſhocks from the political world. In the latter part of the reign of Henry VI. while the nation was in arms, and the throne was overturned by ſucceſſive revolutions, the courts of law enjoyed an entire peace; and juſtice was adminiſtered with a preciſion, learning, and effect, which was not ſurpaſſed in ſucceeding times. All theſe reigns abounded with eminent lawyers.

EDWARD IV. with all his regard to the laws, was guilty of ſtraining the conſtruction of them to gratify his reſentments. It is a common ſtory of this king, that having killed a favourite deer of a Mr. Burdet of Arrow in Warwickſhire, that gentleman vented his reſentment by wiſhing the horns of the deer in the belly of the man who had adviſed the king to that inſult upon him; for which the king ordered him to be proſecuted as for treaſon, and that unhappy gentleman was beheaded. This man is ſaid by others to have been proſecuted (probably under a fictitious charge) for poiſoning, ſorcery, and inchantment (*a*), and that he was attainted by parliament. Theſe imaginary powers were conſidered as common and very heinous offences in thoſe times: one John Stacy was executed for a charge of that kind in this reign. The extraordinary proceedings under the protectorate and reign of Richard III. the numberleſs arreſts, impriſonments, murders, and murders under the name of executions, can hardly be conſidered as ſubjects for a Hiſtory of the Law.

RICHARD II. raiſed money upon the ſubject without conſent of parliament; an enterprize which neither Henry IV. V. nor VI. ever attempted. It is remarked of the houſe of Lancaſter, that its princes always paid a regard to the rights of the people; a policy which they adhered to probably to avoid exciting any ſpirit to queſtion their title to the throne. This temper in the crown contributed to raiſe the houſe of commons into great conſideration during theſe reigns: they became more jealous of their rank in the ſtate than ever, and particularly on this ſubject of taxation. It is to be attributed to this, that when Edward IV. invented a new method of raiſing money without aſſent of parliament, it was thought prudent to give it the gentle name of a *benevolence*. Notwithſtanding the plauſibility of the term, the commons were uneaſy under this innovation; and in the ſhort parliament of Richard III. when they could obtain every thing they aſked for, an expreſs ſtatute was made to prevent the conſequences of this new precedent in taxation (*b*).

(*a*) Stowe's Chron. 430. (*b*) Stat. 1 Rich. III. c. 2.

THERE

THERE happened in 31 Hen. VI. a fact which greatly infringed the privileges of this riſing part of the legiſlature. Their ſpeaker, *Thomas Thorpe*, was taken in execution in an action of treſpaſs *de bonis aſportatis*, at the ſuit of the duke of York, then preſident of the parliament. The commons made a repreſentation of this to the king and lords, and they conſulted the judges, who were of opinion, that if a member of parliament was arreſted for any cauſe but treaſon, felony, or ſurety of the peace, or for a judgment had before parliament, it was uſual for ſuch perſon to be diſcharged from the arreſt. But notwithſtanding this direct and expreſs opinion, the lords came to a reſolution, that the ſpeaker ſhould continue in cuſtody, notwithſtanding his privilege of member and ſpeaker (*a*). The commons acquieſced in this reſolution, and choſe another ſpeaker in his place. This temper in the commons can only be accounted for from the prevailing humour in favour of that great pretender to the throne.

THERE ſeems to be the ſame irregularity in criminal proceedings as in the former periods. Even in a time of tranquillity, and under the adminiſtration of the good duke of Glouceſter, in the reign of Henry VI. a ſtate-criminal was ſentenced without any trial. Sir John Mortimer had been committed to priſon, and having eſcaped was indicted for that eſcape: the indictment was removed into the houſe of lords, where he was adjudged guilty, and was executed. However, here had been an examination by the jury at leaſt, who found the bill; and we have ſeen, in the early ages of our law, that was the utmoſt which a priſoner was entitled to (*b*).

IN 27 Henry VI. we find a very ſingular proceeding againſt the duke of Suffolk. This nobleman was impeached by the commons. The duke upon his knees denied the whole charge before the lords. At length the king ſent for all the lords ſpiritual and temporal then in town to his chamber. There the chancellor put the queſtion to the duke, which way he would be tried: to this the duke anſwered, by referring to his former denial of the charge; and proteſting his innocence, put himſelf intirely on the king's mercy and award. Then the chancellor, by the king's command, pronounced this ſentence: "That ſince the duke did not "put himſelf on his peerage, the king as to the articles of treaſon was "doubtful; and as to the articles of miſpriſion, the king, *not as judge by* "*the advice of the lords*, but as one to whoſe order the duke had ſubmitted "himſelf, did baniſh him the realm and other his dominions for five years."

(*a*) Cotton. 651. 2 Parl. Hiſt. 287. (*b*) Part I. 324.

After this, the lord high-conſtable ſtood up on behalf of the biſhops and lords, and required it to be enrolled, that the ſaid judgment was by the king's own rule, and not by their aſſent; and alſo required, that neither they nor their heirs ſhould by this example be barred of their peerage and privileges *(a)*.

The ſtatutes.

THE memorials of the law during this period conſiſt in the ſtatutes, rolls of parliament, the year-books, and ſome law-treatiſes. Many inconveniencies ſtill aroſe from the antient method of making the ſtatutes from the petition and anſwer on the parliament-roll. To remedy all theſe, about the end of the reign of Henry VI. or beginning of Edward IV. the practice was introduced of putting the proviſions intended to be made, into the full and complete form of an act of parliament, in the firſt inſtance; which was the identical inſtrument that received the king's aſſent. To this they uſed to prefix this title; *Item quædam petitio exhibita fuit in hoc parliamento* FORMAM ACTUS *in ſe continens*; a title which imported in the terms of it a remembrance of the antient method of preferring the petition. This title is now diſuſed; but, excepting that circumſtance, this is the preſent way of paſſing acts of parliament. The language of the ſtatutes during the reigns of Henry VI. and Edward IV. was ſometimes in Engliſh, and more uſually French; but in the reign of Richard III. the ſtatutes are all in Engliſh: at that time alſo they were firſt divided into *public* and *private*. The origin of theſe private acts has been before related *(b)*.

Reports.

OF the year-books of Henry VI. and his ſucceſſors, it may be ſaid, that both the matter and ſtile of them are more ſuited to the reading of a modern lawyer than any of the former; ſo that they are much more worthy of notice than thoſe of the preceding reigns. They contain a fuller account of what paſſed in court, queſtions of law are better debated, and the opinions of the judges given more at length. The ſecond part of Henry VI. and the whole of Edward IV. particularly the long *quint*, as it is called, are full of excellent learning. The firſt part of Henry VI. is pronounced by a great lawyer to be more barren, ſpending itſelf in much learning of little moment, and now out of uſe *(c)*.

THE other monuments of our law in this period are ſome treatiſes written by learned men; ſuch as Forteſcue's book *De Laudibus Legum Angliæ*, and Littleton's *Tenures*, to which may be added *Statham*'s Abridgment.

Forteſcue de Laudibus.

SIR John Forteſcue, who had been ſome time chief-juſtice of the king's-bench, is ſaid to have written this work, *De Laudibus Legum Angliæ*, while he

(a) 2 Parl. Hiſt. 273. *(b)* Vid. ant. 333. *(c)* Hale's Hiſt. 176.

was

was enduring a kind of exile with the prince of Wales, and others of the Lancaſtrian party, in France. Sir John was then made chancellor; and he there ſuppoſes himſelf holding a dialogue with the young prince on the nature and excellence of the laws of England compared with the civil law, and thoſe of other countries. He conſiders at length the mode of trying matters of fact by jury, in preference to that by witneſſes. He ſhews, that ſome of our princes wiſhed to introduce the civil law merely for the ſake of governing (*a*) in the arbitrary way allowed by that law, which declares, *quod principi placuit, legis habet vigorem.* He then proceeds to examine ſome other points of difference in the two laws, always deciding in favour of our own; as the baſtardizing iſſue born before wedlock (*b*), *partus non ſequitur ventrem*, SED SEQUITUR PATREM; guardianſhip committed to thoſe who could not by law ſucceed to the inheritance (*c*); and in the puniſhment of theft no regard paid to a diſtinction between *furtum manifeſtum, & non manifeſtum* (*d*). He concludes his book with a ſhort account of the ſocieties where the law of England was ſtudied, the degrees and ranks in the profeſſion (*e*), with the manner in which they were conferred; to which are ſubjoined ſome ſhort remarks on the conduct and delay of ſuits.

THIS treatiſe ſeems to be intended as an introduction to ſome more particular work on the Engliſh law; the object of it being rather to take off the diſcredit which ſome civilians had endeavoured to throw on it, and to promote a more general acquaintance with it among perſons who did not ſtudy it profeſſionally. It is written in a tolerable Latin, and diſplays ſentiments of liberty and limited government which one would hardly expect to find in a writer of this period. There runs through the whole an air of probity and piety, that conciliates the attention of the reader, in ſpite of the many ſcraps quoted from the Fathers which are interſperſed, very often unſeaſonably enough. This is the principal work of our author, and the only one in print. There are ſaid to be other writings of his in manuſcript.

LITTLETON was a judge of the common-pleas in the reign of Edward IV. and compoſed his book of *Tenures* for the uſe of his ſon, to whom it is addreſſed. It contains three books; the firſt, upon eſtates; the ſecond, upon tenures and ſervices; which two tended to explain more at large the principal ſubject of the old book of tenures: the third diſcourſes of ſeveral incidents to tenures and eſtates. This little treatiſe has acquired more notice

Littleton.

(*a*) Chap. 34, 35, 36. (*b*) Chap. 40. (*c*) Chap. 44. (*d*) Chap. 48. (*e*) Chap. 42, 43, 44.

than

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than any other book in the law; which is to be aſcribed partly to the nature of the ſubject, and partly to the manner in which it is treated, and the great character of the writer when a judge.

THE learning of real property had in the reign of Edward III. been cultivated with a minute attention: the period which had elapſed ſince that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined ſyſtem, conſtituting, in every reſpect, the moſt intricate part of our juriſprudence. Theſe later determinations had rendered the old treatiſes of the law in a great degree obſolete. Bracton, tho' more full than any of the reſt, being more antient, afforded no light in that ſort of queſtions which were now uſually canvaſſed, and which had originated intirely ſince his time: ſtill leſs was to be expected from Fleta, Britton, and The Mirrour, tho' of a later age. In this ſtate of things, it was an undertaking much to be wiſhed, that ſome one ſhould explain in a methodical way the new learning that had ariſen on the ſubject of tenures and eſtates. This our author has done, with a felicity which has placed him in a rank above all writers on the Engliſh law.

IF we enquire what is the excellence which has entitled this writer to ſo high a character, it will be found to be of a particular kind. It is not a beautiful arrangement of his ſubject; not a remarkably apt diviſion of his matter; not a ſtrict adherence even to his own plan, by preſerving a cloſe connection between the matter and title of a chapter; in all which he is ſometimes more defective than writers of inferior note. The excellence of Littleton ſeems to conſiſt in the great depth of his matter, and ſimplicity of his manner; in a comprehenſive way of thinking, and a happy method of explaining; with a certain ſignificance and clearneſs of ſtyle, that is always plain yet expreſſive and ſatisfactory.

THIS author uſually quotes no authority for what he advances. In this, however, he does not differ much from his cotemporaries, who even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities, which has obtained ſo much ſince. Whenever he has a point to handle which is not thoroughly ſettled, he generally ſtates the different opinions on it, and then gives his own reaſons for differing or agreeing with either: and where he does not deliver an opinion declaredly his own, the laſt is ſuppoſed to be that which he is inclined to adopt. This rational and candid way of treating every thing, added to the known abilities of the author,

author, acquired him ſuch a confidence with poſterity, that any thing out of Littleton has been taken upon that authority alone. Thus, the want of references, which at firſt might ſeem a want of authenticity, has in the end adminiſtered to the fame of this writer; as opinions which otherwiſe might be vouched from an adjudged caſe, are now wholly reſted on the words of Littleton.

The undiminiſhed reputation which this author ſtill poſſeſſes, is owing principally to the choice of his ſubject. The law of eſtates and tenures, as underſtood in the time of Littleton, is at this day the beſt introduction to the knowledge of real property; and though great part of this volume is not now law, yet ſo intimately was the whole of this ſyſtem connected, that what remains of tenures cannot be underſtood without a knowledge of what is aboliſhed; and therefore the parts of Littleton which are now obſolete, are ſtudied both with profit and pleaſure. We may ſtill ſay what the author pronounced of his work in another reſpect: "Though certain things which are moved, and "ſpecified in the ſaid book, are not altogether law, yet ſuch things ſhall "make thee more apt and able to underſtand and apprehend the arguments "and reaſons of the law (*a*)."

Besides this, the law of tenures and eſtates has always been thought the moſt natural entrance into the ſtudy of the law in general; therefore this ſmall volume became the firſt book which was put into the hands of the ſtudent; and while it was conſidered by practicers and the courts as a book of the higheſt authority, it was at the ſame time the inſtitute to Engliſh juriſprudence. Lawyers gave their earlieſt and lateſt application to the text of Littleton: every ſection and ſentence was weighed, and every propoſition conſidered in all its conſequences; it was tranſlated, commented, and analyſed; and every method contrived to gain a complete knowledge of its contents. Perhaps, no book, in any ſcience ſo confined as the municipal laws of any country muſt be, has more employed the labours of the learned and induſtrious. A writer, who was himſelf one of the greateſt ornaments of the law, and whoſe name never appears greater than when accompanied with that of our author, furniſhed the world with a very copious and minute commentary on this book; in which he has carried his attention to the import of every word ſo far, as to make intereſting remarks on his very *et cæteras*. The fame of Littleton has not been confined to this iſland. As the Norman lawyers made Glanville a model upon which to form their *couſtumier*, and give ſyſtem to their juriſprudence, a modern writer of that country has lately made a learned

(*a*) Litt. Epilog.

comment

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comment on Littleton, as the beſt help towards illuſtrating their own cuſtoms and laws.

Statham.

THE learning of the law was thrown into a more methodical form than it had ever yet received, by *Statham*, who was a baron of the exchequer in the time of Edward IV. This was in his *Abridgement of the Law*; being a kind of digeſt, containing moſt titles of the law, arranged in alphabetical order, and compriſing under each head adjudged caſes, abridged from the year-books in a conciſe manner. The plan of this work was intirely new, and conceived with ſome judgement, though the execution was imperfect, and left open to improvement. The caſes are ſtrung together with reference to nothing but the chronology of their adjudication, without any regard to the connexion of their matter. With all its incompleteneſs, this muſt have been a very valuable work at the time it was compiled, when the helps to the law were few and confined. This Abridgement has ſerved as a model to others in later times; which, without the merit of originality, have ſurpaſſed their maſter's performance in method, preciſion, and extent.

Miſcellaneous facts.

THE flouriſhing ſtate of the law during this period may be collected from a ſhort account of the law-ſocieties, and ſome circumſtances relating to their members. We are told, that in the reign of Henry VI. there were ten leſſer inns, which were called *inns of chancery*, each containing at leaſt one hundred ſtudents, and ſome a great many more. Theſe were deſigned as places for elementary ſtudies: here they learnt the nature of original and judicial writs, theſe being then conſidered as the firſt principles of the law; and for this reaſon theſe inns were denominated from the chancery. When young men had made ſome progreſs here, and were more advanced in years, then they were admitted into the *inns of court*. Of theſe there were four in number, which we have before mentioned in the reigns of Edward II. and III. The leaſt of theſe, it is ſaid, contained two hundred ſtudents (*b*).

IT is ſaid by a writer of that time, that a ſtudent could not reſide in the inns of court for leſs than 28l. per ann. and proportionably more, if he had a ſervant, as moſt of them had. For this reaſon, they were generally ſons of perſons of quality. Knights, barons, and the greateſt nobility of the kingdom, often placed their children here, not ſo much to make the laws their ſtudy, as to form their manners, and preſerve them from the contagion of vicious habits: for, ſays he, *all vice was there diſcountenanced and baniſhed*;

(*a*) Forteſc. de Laud. ch. 49.

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niſhed, and every thing good and virtuous was taught there; muſic, dancing, ſinging, hiſtory ſacred and profane, and other accompliſhments (a).

THE degree of ſerjeant at law was conſidered in a very reſpectable light: none could be a judge in the king's-bench or common-pleas, but one who had been firſt a ſerjeant; nor was a perſon to be called to the degree of ſerjeant, till he had been in the general ſtudy of the law abovementioned at leaſt for ſixteen years, which probably meant from his firſt entrance at an inn of chancery. The ceremony and expence attending a call of ſerjeants was at this time very great; in general, about ſeven or eight were called at a time: and on that occaſion, ſays our author, there were revels and feaſting for ſeven days together, *as at a coronation.* The expence each ſerjeant was at ſeldom fell ſhort of 260l. out of which one-ſixth was uſually expended on rings. Sir John Forteſcue, who was afterwards chief juſtice and chancellor, ſays, that it coſt him 50 l. in rings; we may judge from this what the profits of practice muſt have been (*b*). They were generally called *the king's ſerjeants*, becauſe they were called to this honour by the king's writ; and they had a ſalary from the crown, as well as the king's attorney.

IT ſeems that learned apprentices were not always ambitious of the ſtate and degree of a ſerjeant; but, on the contrary, when called thereto, ſome of them have tried all ways to avoid it. There is an inſtance of this in the fifth year of Henry V. in John Martin, William Rabington, William Pole, William Weſtbury, John June, and Thomas Rolfe, ſix grave and famous apprentices, who having writs delivered to them to take the ſtate and degree of ſerjeant, returnable in Michaelmas term, and having in vain tried all means of evading the direction of the writ, upon the return thereof in chancery made an abſolute refuſal. Upon this they were called before the parliament, which was then ſitting, and there charged to take upon them the ſtate and degree of ſerjeants, which at length they conſented to do (*c*).

THE king's attorney was the only law officer of the crown of that kind till the reign of Edward IV. In the firſt year of that king we find *Richard Fowler* was made *ſolicitor* to the king (*d*), and in 11 Edw. IV. *William Huſee* was appointed *attorney-general* in England (the firſt mention we have of this title), *attornatus generalis in Angliâ cum poteſtate deputandi clericos ac officiarios ſub ſe in quâlitercunque curiâ de recordo* (*e*). This officer uſed to be made for life.

THERE were uſually in the court of common-pleas five judges, ſometimes ſix, but never more; in the king's-bench there were ſometimes four,

(*a*) Forteſc. de Laud. Leg. Angl. c. 49. (*b*) Ibid. c. 50. (*c*) Rot. Parl. An. 5 Hen. V. 2 Inſt. 24. (*d*) Dugd. Chro. Series, 67. (*e*) Ibid. 71.

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ſometimes five. It is ſaid that they did not ſit above three hours a day in court, and that was from eight in the morning to eleven. The courts were not open in the afternoon; but that time, ſays our author, was left unoccupied, for ſuitors to conſult with their counſel at home *(a)*. The ſame writer ſpeaks of the qualifications of a judge, as not to be attained but *per viginti annorum lucubrationes*.

THE ſalaries of the judges in the time of Henry IV. were as follows: The chief baron and other barons had 40 marks per ann.; the chief of the king's-bench and of the common-pleas, 40 l. per ann.; the other juſtices in either court, 40 marks *(b)*. But the gains of the practicers had become ſo great, that they could hardly be tempted to accept a place on the bench with ſuch low ſalaries: therefore in 18 Hen. VI. the judges of all the courts at Weſtminſter, together with the king's attorney and ſerjeants, exhibited a petition in parliament concerning the regular payment of their ſalaries, and perquiſites of robes. The king aſſented to their requeſt, and order was taken for increaſing their income, which afterwards became larger, and more fixed: this conſiſted of a ſalary, and an allowance for robes. In 1 Edw. IV. Markham the chief juſtice of the king's-bench had 170 marks per ann. penſion, 5l. 6s. 6d. for his winter robes, and the ſame for his Whitſuntide robes; *juxta formam* (ſays the record) *cujuſdam actûs in parliamento* 18 *Hen. VI. (c)* Moſt of the judges had the honour of knighthood; ſome of them were knights-banneret, and ſome had the order of the Bath *(d)*.

THE following is the ſtate of the *Hoſpitia*, or Inns, for the reſidence of profeſſors of the law in the time of Henry VI.

PART of Serjeant's Inn in Chancery-lane was inhabited by ſome ſerjeants in the time of Henry IV. when it was called *Faryndon's Inn:* the inheritance of it belonged to the biſhops of Ely. In the reign of Henry V. the whole houſe was demiſed to the judges, and apprentices of the law, as appears by ſums accounted for to the biſhop. In 9 Henry VI. it obtained the name of *Hoſpitium Juſticiariorum*. In 2 Rich. III. there is a leaſe of it under the name of *Hoſpitium vocatum Serjeant's Inn*; this demiſe is at 4l. per annum. It appears in 21 Hen. VI. that the ſerjeants then, if not before, held Serjeant's Inn in Fleet-ſtreet under a demiſe from the dean and chapter of York, at the rent of 10 marks per annum *(e)*. There was alſo *Scrope's Inn*, inhabited by ſerjeants, which was ſometimes called Serjeant's Inn. This was an inn during the reign of Richard III. and was next to Ely-houſe, oppoſite St. Andrew's church, in Holborn *(f)*.

(a) Dugd. Chro. Series, c. 51. *(b)* Ibid. 105. *(c)* Ibid. 109. *(d)* Ibid. 103. *(e)* Ibid. 326. *(f)* Dugd. Or. 333.

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THE *inns of court* were the four which have already been mentioned (*a*). The ten *inns of chancery* in the reign of Henry VI. were the following: *Clifford's Inn*, which we have ſeen was exiſting in the time of Edward III. *Lyon's Inn*, which was an inn of chancery as early as the reign of Henry V. and had the ſign of the black lion. *Clement's Inn* was a reſidence for ſtudents in the reign of Henry IV. if not before. *New Inn* had been a common inn for travellers, and, from the ſign of the Virgin Mary, it was ſometimes called Our Lady's Inn. This houſe was inhabited by the ſtudents who removed from an old inn of chancery, called *George's Inn*, near St. Sepulchre's church without Newgate. *The Strand Inn*, otherwiſe Cheſter Inn, from its neighbourhood to the biſhop of Cheſter's houſe. This inn, together with the church of St. Mary le Strand, was pulled down in Edward the VIth's time, to make room for building Somerſet-houſe. *Thavies Inn* we have ſeen was a reſidence for ſtudents in the reign of Edward III. It was granted in fee to the benchers of Lincoln's Inn in Edward the VIth's time. *Furnival's Inn*, which once belonged to the lords Furnival, was an inn of chancery in 9 Hen. IV. The ſtudents held it under a leaſe: in the time of Edward VI. the inheritance was in the then lord Shrewſbury, who ſold it to the ſociety of Lincoln's Inn, under whom the ſociety of Furnival's Inn are now tenants. *Staple's Inn* was an inn of chancery in the time of Henry V. the inheritance of it was granted in 20 Hen. VIII. to the ſociety of Gray's Inn. *Barnard's Inn* was a law-ſociety in the time of Henry VI. The tenth was perhaps *George's Inn* above mentioned.

THESE inns of chancery became all of them appendages to ſome one of the inns of court: of theſe, ſeven only are now ſubſiſting; Strand Inn being taken down in the reign of Edward VI.; George's Inn long before, and Thavies Inn within theſe few years.

(*a*) Vid. ant. 49. 224.

CHAP.

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HENRY VII.

Poyning's Laws—Statutes of Pernors of Profits—Statutes of Fines—Alienation of Jointreſſes made void—Suits in Formâ Pauperis—Attaints—Benefit of Clergy—Stealing an Heireſs—Appeal of Murder—Bailing Felons by Juſtices of Peace—The Star-Chamber new-modelled—Informations at the Seſſions and Aſſizes—The Chancery—Uſes—Aſſumpſit—Ejectione Firmæ—King and Government.

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THE reign of Henry VII. exhibits ſome remarkable inſtances of innovation upon the old law. In it we find the ſtatute of fines, which operated as a virtual repeal of that great ſubject of jealouſy, the ſtatute *de donis*: the benefit of clergy was taken from offenders of a certain deſcription: regulations were made for modifying that ancient exemption, and for advancing the adminiſtration of criminal juſtice. Among the deciſions of courts, there was one concerning the action of ejectment, that had the effect of bringing about a conſiderable change in the courſe of legal remedies for recovering lands. It will be proper firſt to mention ſuch laws as relate to the king and nation at large, and then proceed to the changes made in the law of private rights.

JUST after the landing of Perkin Warbeck, in Kent, a law was made of a new impreſſion. Apprehenſive of the conſequence of ſuch attacks upon his title, Henry's friends prevailed on him to conſent to ſome ſecurity for them, in caſe of changes: this was done by ſtat. 2 Hen. VII. c. 1. which ordains that no perſon who, in arms or otherwiſe, aſſiſts the king for the time being ſhould afterwards be convicted or attainted thereof, as of an offence, by courſe of law, or by act of parliament; and all proceſs and acts of parliament to the contrary are declared void. This act is ſaid by a learned and eminent writer (*b*), to be rather juſt than legal, and more magnanimous than provident. However, it ſeems to have been founded on principles of humanity and good ſenſe.

(*a*) 2 Parl. Hiſt. 422. (*b*) Lord Bacon.

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Poyning's laws.

An act of the Iriſh parliament made in this reign, as it communicated to that kingdom a participation of our municipal laws in a more full manner than it before enjoyed them, is worthy of notice. Amongſt other laws made under the government of ſir Edward Poynings in 10 Hen. VII. and therefore called Poynings' Laws, it is enacted, in c. 22. that all acts of parliament made in England before that period ſhall be in force within the realm of Ireland. The extending of the dominion of the Engliſh law by an act of that legiſlature, contributed to connect theſe two kingdoms in the ſtricteſt bond of union; that of ſimilar laws, and a ſimilar conſtitution; the grounds and great outlines of which will ever be preſerved by the appeal which lies from the courts of that country to the courts here, notwithſtanding the differences that muſt by degrees ariſe from a diſtinct parliament providing for the exigencies of a diſtinct people.

However, that this legiſlative authority might be kept under ſuch reſtrictions as would prevent it from exerciſing its powers in a manner not conſiſtent with the ſovereignty of the larger kingdom, an act had been made by chap. 4. of the ſame ſtatute to the following effect: That before a parliament be ſummoned or holden, the chief governor of Ireland ſhould certify to the king, under the great ſeal of Ireland, the conſiderations and cauſes thereof, and the articles of the acts to be propoſed therein. That after the king in his Engliſh council ſhall have conſidered, approved, and altered, the ſaid acts, and certified them back under the great ſeal of England, and ſhall have given licence to ſummon and hold a parliament, then the ſame ſhould be ſummoned and held; and therein the acts ſo certified, and no other, ſhould be propoſed and received, or rejected.

These proviſions received ſome alterations afterwards, by ſtat. 3 and 4 Ph. and M. c. 4. (Iriſh ſtatutes) which allows propoſitions to be certified to England, in the uſual forms, even after the ſummons, and during the ſitting of parliament. Since which, without any act of parliament to authorize the innovation, it has long been the practice to bring bills originally into either houſe of parliament under the denomination of "heads of a bill;" which when paſſed, are preſented to the lieutenant and council there, who tranſmit them to the king in council, or reject them, without any tranſmiſſion (*a*).

The ſtate of pupillage in which their legiſlature is by theſe means kept, even after the licence they had uſed of introducing the preſent mode, is

(*a*) 1 Blackſtone, 102.

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borne with great impatience by the Iriſh of the preſent time; who judge their ſubjection in this article of legiſlation totally incompatible with any notions of a free conſtitution.

AFTER theſe parliamentary proviſions reſpecting the condition of the regal ſtate, and the extenſion of the Engliſh law, we ſhall take notice of two ſtatutes made for the due ordering of juſtices of the peace, and of corporations; and then of ſuch ſtatutes as regard private rights, and the adminiſtration of juſtice.

THE office of a juſtice of peace, which had lately grown to no ſmall importance, came under the conſideration of parliament; when a proviſion was made which it was thought would contribute to a due diſcharge of that truſt. By ſtat. 4 Hen. VII. c. 12. a proclamation, therein ſet forth, is directed to be read at the ſeſſions four times a-year. This exhorted perſons who had cauſe of complaint againſt any juſtice, to ſtate their grievance to any of his fellow-juſtices in the neighbourhood; and if he gave him no redreſs, then to the juſtices of aſſize; and ſhould he ſtill think himſelf not redreſſed properly, to the king or his chancellor.

THAT corporations might not carry the right they had to make bye-laws too far, it was ordained, by ſtat. 19 Hen. VII. c. 7. that all acts and ordinances made by the wardens, maſters, and fellowſhips of crafts and myſteries, and by rulers of guilds and fraternities, ſhall be approved by the chancellor, treaſurer, or chief juſtices of either bench, or three of them; or by the juſtices of aſſize in their circuit; and that otherwiſe they ſhall be void: nor ſhall any bye-law be made to reſtrain ſuits in the king's courts.

Statutes of pernors of profit.

WE now come to the alterations made in the law of private rights. The inconveniences ariſing from the univerſal practice of conveying land to uſes, were felt more and more; and the legiſlature were frequently ſtruggling to remedy, if poſſible, the extreme difficulties under which creditors and purchaſers, lords, and thoſe who had title, laboured, from the ſecret and dormant claims to which land became thereby ſubjected. With a view to remedy theſe evils, the number of ſtatutes againſt pernors of profits was increaſed in this reign. It was provided (*a*), that *ceſtui que uſe* ſhould anſwer to a formedon, and the ſuit be conducted in the ſame manner as if he was ſeiſed of the land. A like redreſs was provided in favour of the lord; who was enabled (*b*) to eſtabliſh his right to wardſhip and relief againſt the heir of *ceſtui que uſe*, as if he were very tenant; and the *ceſtui que uſe*, on the other hand, was furniſhed with means of redreſs againſt his guardian

(*a*) 1 Hen. VII. c. 1. (*b*) Stat. 4 Hen. VII. c. 7.

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for waſte committed, and was entitled to damages againſt any one ſuing him, in a writ of right of ward, without ſucceſs. Land in the poſſeſſion of feoffees was made ſubject to ſuch executions and heriots, as the *ceſtui que uſe* was liable to (*a*). And the bondman could no longer withdraw his freehold, nor could he purchaſe any, free from the lord's right of ſeizure, by ſheltering it under the protection of a uſe.

Statute of fines.

NOTWITHSTANDING the blow that was given to the ſtatute *de donis* by the determination in Taltarum's caſe, the effects of entails were viewed with a jealous eye by this king. It ſhould ſeem, ſomething more was wiſhed than that reſolution to ſubſtantiate ſo bold and new a doctrine as that of barring entails, and virtually repealing an ancient ſtatute, upon which the whole landed property of the kingdom had been ſettled. Henry ſaw that the conſequence of a free power of alienation would be a gradual decline of the wealth and importance of the nobility, and a proportionate increaſe in that of the Crown; and knowing how much this concurred with his favourite ſcheme of aggrandizement, he procured the ſtatute of fines (*b*) to be paſſed.

THUS far political management ſupported political reaſons; but others ariſing from the nature of a fine, as a common aſſurance of the realm, prevailed with many, and contributed to render ſome proviſion for the improvement of this ſecurity extremely deſirable. By the ſtatute *de modo levandi fines*, 18 Ed. I. claim muſt be made within a year after the fine levied by the perſon next immediately having right, without permiſſion to thoſe in the ſubſequent remainders to claim on his default; ſo that, if there was tenant for life, remainder for life, or remainder in fee, and the firſt tenant for life aliened, and the next remainder-man for life made no claim, the remainder-man in fee was without remedy. This miſchief was one of the great cauſes of making ſtat. 34 Ed. III. c. 16. by which non-claim was ouſted; that is, the precluſion of a perſon's right for not making his claim within the year was taken away. The intereſt of the donor had been provided for by a clauſe much in the nature of this of non-claim, in ſtat. Weſtm. 2. c. 1. which ordains, that it ſhall not be neceſſary for ſuch heirs, that is, thoſe in tail, or thoſe in reverſion, to put in claim. Beſides theſe reaſons, another great cauſe of the ſtatute of non-claim was the interruption of foreign and domeſtic wars, which prevented people from attending to matters of property.

NOTWITHSTANDING the policy which might be thought to dictate that ſtatute, it was found that this doctrine of non-claim had very miſchievous

(*a*) Stat. 19 Hen. VII. c. 15. (*b*) 4 Hen. VII. c. 24.

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conſequences. Fines, the ancient aſſurances of the kingdom, became of leſs validity and effect, and were virtually very little more than feoffments of record. To remedy the endleſs conteſts and litigation to which eſtates were now expoſed, and to reſtore fines to their former efficacy, were no inconſiderable objects of ſtat. 4 Hen. VII. The makers of this act ſeem to have purſued the reaſon of the common law, and to have intended to put fines into the ſame condition they were in before non-claim was ouſted.

THIS ſtatute is couched in thoſe covert and indirect terms, that indicated an apprehenſion of ſome remaining prejudices in favour of entails; for without any apparent reference to entails, or the declaration of the ſtatute *de donis*, that fines, as againſt entails, ſhall be void; it enacts generally, "that fines of land levied with proclamation ſhall conclude *as well privies as ſtrangers.*" There is in the preamble mention made of the ſtat. 17 Ed. I. *de finibus*, and the ſtatute of non-claim, to which it would intimate the whole was meant to refer; ſo that after all, as to the effect of this ſtatute, it is only by conſtruction that a fine is made a bar of an eſtate tail. This branch of the ſtatute was afterwards explained and ſupplied by another made in the next reign (*a*).

FINES levied according to this ſtatute, and to have the effect here given them, were to be ſolemnly read and proclaimed in the three terms next following the ingroſſing, at four days in every term, during which proclamation all pleas were to ceaſe. There is a ſaving of the rights of ſuch as might not be in a condition to vindicate their claims; ſuch as femes covert, perſons under twenty-one years, perſons in priſon, out of the realm, or not of whole mind, at the time of the fine levied; and ſaving to every perſon not being a party thereto ſuch right as he had at the time of the fine being ingroſſed, ſo as he purſue his title within five years next after the proclamations had.

THIS ſtatute may be conſidered in two lights; as intended to quiet poſſeſſions, and to cut off entails. The former was the direct and oſtenſible reaſon for paſſing it; the latter is a conſequence of law, naturally and neceſſarily following from the other. The beſt way of perfecting the alienation of tenant in tail, was, by confirming the intereſt of the alienee, and depriving the iſſue of all power to invalidate it.

Alienation of jointreſſes made void.

THERE was another ſtatute made concerning real property, which deſerves notice. It was found neceſſary to remedy an abuſe that had been practiſed by widows, while in poſſeſſion of their dower or jointure. They were in this

(*a*) Stat. 32 Hen. VIII. c. 36.

manner

manner ſeiſed of the freehold, and of all the privileges annexed to it; and could therefore exerciſe a right over it, which laid thoſe next in ſucceſſion quite at their mercy. To prevent this, it was enacted, by ſtat. 11 Hen. VII. c. 20. that if any woman, having an eſtate in dower, or for life, or in tail, jointly with her huſband, or ſolely to herſelf, of the inheritance or purchaſe of her huſband, or given by any of his anceſtors; if a woman, having ſuch eſtate, ſhould, either when ſole, or when married to a ſecond huſband, diſcontinue, or alien, or ſuffer a recovery, it ſhall be void; and the perſon next intitled may enter and enjoy the land the ſame as if ſuch woman were actually dead. There is a proviſion, that a woman may alien for her own life, and if the perſon next intitled agrees to it, ſhe may alien for any greater eſtate. However, the widow was prevented from making a property of that which had been allotted to her for an honourable proviſion during life; and the reverſion to the heirs of the huſband and his family was effectually ſecured.

THERE is only one ſtatute relating to the right of perſonal property, which much deſerves our notice; that is, ſtat. 3 Hen. VII. c. 4. which was made to prevent the frauds committed on creditors by perſons, who, having made deeds of gift of their effects, would fly to ſanctuary and other privileged places, and there live upon their property, in defiance of thoſe who had demands on them. It was enacted by this ſtatute, that all deeds of gift of goods and chattels in truſt for, and to the uſe of the perſon making them, ſhall be void.

WE ſhall now ſpeak of ſuch ſtatutes as made any alteration in the courſe of adminiſtering juſtice. Theſe were not many; but yet, together, contributed either to render the means of obtaining juſtice more ready, or delays leſs incommodious.

OF the latter kind was ſtat. 3 Hen. VII. c. 10. which was intended to prevent a litigious ſtay of execution by writ of error; and ordains, that if a defendant or tenant brings a writ of error, and the judgment be affirmed, or the writ be diſcontinued, or the plaintiff in error nonſuited, he ſhall pay coſts and damages to the other party for the delay and wrongful vexation, by diſcretion of the court where the writ of error is depending.

THE ſtat. 4 Hen. VII. c. 20. reſpecting popular actions, as it had a view to the emoluments of the exchequer, bore in it a ſtriking mark of the genius of this reign. It had become the policy of this prince to enforce ſuch penal laws as contributed to the increaſe of forfeitures and penalties; and every thing which prevented the full effect of ſuch laws, was to be removed. It was common for offenders to get a friendly action brought againſt them for the penalty they had incurred; or if an adverſe plaintiff had commenced

a ſuit,

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a ſuit, they would get a friend to ſue them, and by this colluſion would confeſs a judgment to him, and plead that in bar of the other action. To prevent the effect of ſuch practices, it was provided by this ſtatute, that in the like caſes the plaintiff may reply covin, and have judgment and execution as if no other action had been brought; and where the colluſion is proved on the defendant, he is to ſuffer impriſonment. It was further provided, that no releaſe of any popular action by a private perſon ſhould be a bar to ſuch action or indictment; nor, on the other hand, is colluſion to be replied, where the point of the action had been tried, and a verdict had.

Suits in formâ pauperis.

ALLOWING perſons to ſue *in formâ pauperis*, as was done by ſtat. 11 Hen. VII. c. 12. was a humane conſtitution, and reſembled more the legiſlation of an imaginary republic, than the practice of actual governments. It was ordained, that every poor perſon ſhould have original writs and writs of *ſubpœna*, without paying for the ſealing or writing thereof; and the chancellor was, for that purpoſe, to aſſign clerks, and learned counſel, and attornies. If the writ was returnable before the juſtices of any court of record, they were alſo to aſſign counſel and attornies, to act without a fee. This indulgence may, however, be thought by ſome dangerous, and needed that caution and reſtriction which by a later act has been annexed to this privilege. To enable one to commence a litigation without expence, is tempting the reſentments of men with too eaſy a gratification; and the defendant in ſuch a ſuit is left in a very unequal conteſt.

Attaints.

ATTAINTS, tho' in the nature of a criminal proceeding, may be mentioned in this place among the improvements made in civil proceſs; as they were deſigned for the purpoſe of rendering the trial by jury as incorrupt and effectual as the nature of it would allow. It was now endeavoured to put attaints upon a different foot than they had been on before. Attaints had become very dilatory, laſting ſometimes ten years (*a*), and were attended with great expence, as well as impediment, in the conduct of them. Theſe conſiderations, with that of the extreme rigour of the villainous judgment, induced perſons rather to ſuffer the injury they received from a falſe verdict, than be at the trouble of redreſſing themſelves in this manner, or contribute towards inflicting ſo cruel a puniſhment. As a ſubſtitute for the ancient ſeverity, a new order of proceeding and penalty was contrived by ſtat. 11 Hen. VII. c. 24. which ordained a pecuniary mulct inſtead of the common-law pains. This ſtatute alſo regulated the proceſs and proceeding, but expired in the next reign, when a new one was paſſed to the ſame effect (*b*).

(*a*) Stat. Hen. VI. c. .

(*b*) Stat. 23 Hen. VIII. c. 3.

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As actions upon the caſe had of late very much increaſed, and had ſupplied the place of many ancient remedies, particularly thoſe of treſpaſs and debt, it was thought adviſeable to make the proceedings therein as effectual as in thoſe old actions. It was therefore enacted by ſtat. 19 Hen. VII. c. 9. that the like proceſs ſhould be in actions upon the caſe, as in actions of treſpaſs and debt, when ſued in the king's-bench or common-pleas, for thoſe only are mentioned in the ſtatute; and it ſhould ſeem, that actions upon the caſe in other courts are not affected by this act.

THE alteration made in the law of crimes and puniſhments in this reign ſeems more remarkable, and of more extenſive conſequence, than any alteration reſpecting the law of property. The criminal code begun now to aſſume a more ſanguinary appearance, which every reign has been ſince heightening. The benefit of clergy, that unmeaning exemption, begun now to be modelled by the legiſlature almoſt into a new form, and applied to the purpoſe of penal reſtriction, with reaſon and effect. It became a diſtinction between crimes, and not between perſons; and being taken away from offenders in ſome crimes, or ſome circumſtances of crimes, and not in others, proportioned the degree of puniſhment according to the true meaſure of diſtributive juſtice, the heinouſneſs of the offence.

Benefit of clergy.

THIS privilege being deſigned at firſt only for the actual clergy, was, it has been ſeen, by degrees extended to all who could read, and ſo were *capable of becoming clerks*. Tho' the ſtat. *de clero* 25 Ed. III. by ſpecifying the orders of clerks that ſhould be intitled to this privilege, excluded actual laymen from claiming clergy; yet the former latitude ſoon prevailed again, and a capacity to read became once more ſynonymous with clergy: it had alſo been the uſage to allow it to all ſuch felons in every ſingle offence. This deviation from the original idea, which permitted every one who could read to commit any felony with impunity, tho' an enormous abuſe, did not ſo ſhock the underſtandings of men bigotted to an eccleſiaſtical tyranny, as to excite at once an entire reform. The legiſlature proceeded gradually, and with reverence for the ancient community they were about to invade; and attacking firſt thoſe who had leaſt claim to indulgence, they ſacrificed laymen to the demands of juſtice. By ſtat. 4 Hen. VII. c. 13. laymen are allowed their clergy only once; and probably to prevent their impoſing on the court at a ſecond trial, and praying their clergy again, it is ordained, that every perſon ſo convicted ſhall, if it is for murder, be marked with an M upon the brawn of the left thumb, and if for any other felony with a T; which marks are to be made by the gaoler in open court in preſence of the judge, before the party is delivered to the ordinary. Thoſe who are actual clerks, are, upon a ſecond trial, if they have not ready their letters of orders, nor a certificate thereof

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from the ordinary, to have a day appointed by the juſtices to bring them in; and if they fail at the day, are to loſe the benefit of their clergy, as thoſe who are not in orders.

THUS was the ancient claim of clergy taken away from certain perſons, who were conſidered as not anſwering the deſcription of clerks properly entitled to that privilege. This was followed about three years after by another ſtatute, which related not to particular perſons, but particular offenders, who were thereby deprived of this benefit. This was done by ſtat. 7 Hen. VII. c. 1. which, having provided ſeveral penalties in caſes of deſertion from the army, enacts, that ſoldiers departing out of the king's ſervice without the licence of their captain, ſhall be deemed felons; and "for as much (ſays the ſtatute) as this offence ſtretcheth to the hurt and jeopardy of the king our ſovereign lord, the nobles of the realm, and of all the common-weal thereof," a perſon ſo offending ſhall not enjoy the benefit of his clergy. Such prevailing reaſons did the parliament think it neceſſary to ſtate for curtailing this privilege, which had been enjoyed by felons for ſeveral centuries.

SOME few years after an accident happened, which brought the ſubject of clergy again under conſideration of the legiſlature. One *James Grame* had murdered his maſter, and a ſpecial act of parliament was made for the puniſhment of this heinous offence, which otherwiſe would have eſcaped under the exemption of clergy. It was therefore enacted by ſtat. 12 Hen. VII. c. 7. that this perſon ſhould be attainted of the murder, as a felon, in petty-treaſon; and ſhould be drawn and hanged, as perſons who are no clerks, notwithſtanding any privilege of clergy. It was alſo further ordained, that for the future, if any lay perſon prepenſedly murder his lord, maſter, or ſovereign immediate, he ſhall not be admitted to his clergy.

THUS far, and no farther, did the legiſlature venture to go, in taking away the privilege of clergy, during this reign. They confined themſelves to an inſtance where the ſafety of the kingdom was immediately intereſted, and to a crime which ſtood in the higheſt order of private offences, namely, petty-treaſon. When this way of heightening the ſeverity of our penal law was once pointed out, it will be ſeen in the next and ſucceeding reigns with what quick ſteps we have haſtened to encreaſe the number of thoſe caſes, in which the blood of our fellow-citizens may be ſhed by law.

THE remaining changes made in our criminal law conſiſt either in the new crimes which the legiſlature created, or in ſuch regulations which were made for the adminiſtering of juſtice.

OF crimes, thoſe which are worthy our notice, are very few: they ſhall be mentioned in the order in which the ſtatutes ordaining them were paſſed.

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THE hunting in parks with viſors and painted faces, was puniſhed by ſtat. 1 Hen. VII. c. 7. which made it felony to reſiſt or diſobey any warrant to arreſt ſuch offenders.

IT was made felony by ſtat. 3 Hen. VII. c. 2. *to ſteal an heireſs*, as it is commonly called; that is, in the words of the ſtatute, to take away any woman againſt her will unlawfully, whether ſhe be maid, widow, or wife; and the takers, procurers, abettors, and thoſe who receive ſuch woman, are all made *principal* felons. A woman ſo taken muſt have ſubſtance in goods and lands, or be heir apparent, and muſt be married, or deflowered, to make the taking an offence under this act.

Stealing an heireſs.

THE laſt new puniſhment we ſhall mention was inflicted by ſtat. 3 Hen. VII. c. 14. which made it felony for any ſervant of the king, being inrolled in the cheque-roll, to compaſs or imagine the death of the king, or any lord, or privy-counſellor, ſteward, treaſurer, or comptroller of the houſhold. This offence is to be enquired of by twelve perſons, inrolled in the cheque-roll, before the ſteward, treaſurer, and comptroller of the houſhold. The puniſhing the bare intention to murder a lord, without any overt-act declaratory of ſuch intention, makes this a very remarkable proviſion; the ſecurity of theſe perſonages being put on the ſame foot with that of the king. The occaſion of this is ſtated in the ſtatute; that ſuch malevolent deſigns among the houſhold ſervants lead to attempts which endanger the king himſelf; and that a recent fact of that kind had induced the parliament to make this ſtatute.

THE laſt penal law we ſhall take notice of is ſtat. 4 Hen. VII. c. 18. which made it high-treaſon to counterfeit the coin of any foreign realm permitted to be current here.

THE execution of penal laws was a ſubject much attended to by this prince. We have before ſeen what ſteps were taken, as well to compel as encourage magiſtrates in a due diſcharge of their duty: we ſhall now take a view of ſuch regulations as were made in the formality and proceedings of juſtice, in order to attain the ſame end. Theſe were effected principally by ſtat. 3 Hen. VII. c. 1. and 3. and ſtat. 11 Hen. VII. c. 3. which acts, among proviſions of real and permanent utility, furniſhed ſome innovations that have ſince been diſapproved of and aboliſhed.

THE firſt clauſe of ſtat. 3 Hen. VII. c. 1. made ſome alteration in the juriſdiction of the ſtar-chamber, the conſideration of which we ſhall defer for the preſent. The remaining part of that ſtatute is taken up with ſeveral proviſions relating to criminal juſtice; one of which was to puniſh the concealments of jurors; others were to promote the proſecution of murderers.

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We have ſeen, in the laſt period, ſome parliamentary regulations regarding jurors, dictated by a ſuſpicion that they did not diſcharge their truſt with impartiality and truth. Among Henry's ſchemes for a due execution of the law, one was to oblige inqueſts to be very ſtrict and regular in making their preſentments. In the firſt clauſe of ſtat. 3 Hen. VII. c. 1. next after the inſtitution of the new form of the ſtar-chamber, it is ordained, that juſtices of the peace "may take by their diſcretions and inqueſt to enquire of the concealments of other inqueſts;" and every perſon of ſuch inqueſt was to be puniſhed for the concealment by the diſcretion of the juſtices. This was a refinement upon the proceeding by inqueſt in criminal matters, and was in the nature of an attaint in civil cauſes.

Appeal of murder.

An appeal of murder ſtill continued a common mode of proſecution; and the genius of the times ſo diſpoſed perſons to favour this vindictive action, that no indictment uſed to be brought at the king's ſuit till the year and day after the fact, which was the period limited by law for commencing an appeal, leſt the offender, being acquitted or convicted on the indictment, might plead ſuch acquittal or conviction in bar of the appeal. After this ſpace of time had elapſed, it often happened, either by the death of witneſſes, or the zeal for juſtice ſubſiding, that proſecutions were entirely dropped, and the delinquent eſcaped unpuniſhed. Again, the party appellor muſt ſue in perſon; and the ſuit being long and expenſive, he frequently became tired of the proſecution; ſo that, with all theſe impediments, juſtice was not regularly enforced againſt this kind of offenders. To remedy this in future, the following regulations were made by this act:—It was enacted, that if any principal or acceſſary in murder be indicted, he may be arraigned and tried at the king's ſuit at any time within the year, and not tarry the year and day for the appeal; and ſhould he be acquitted, the juſtices are not to diſcharge him, but, either remand him to priſon, or let him to bail, till the year and day is paſt; within which time, the perſon ſo acquitted, or even if he ſhould be attainted, and not have the benefit of his clergy, the perſon ſo attainted may yet be appealed by the wife or next heir before the ſheriff and coroners, or in the king's-bench, or at the gaol-delivery. To facilitate the proſecution of ſuch appeal, it was allowed, that where battail did not lie, the appellor may ſue by attorney.

The power of trying an offender a ſecond time for the ſame offence is confined to caſes where the party had not had his clergy, becauſe clergy was in lieu of, and a ſpecies of, puniſhment; and tho' for the ends of juſtice the law ordains a ſecond trial, it would not go ſo far as to inflict a double puniſhment. This proviſion, tho' very ſenſible when firſt made, has occaſioned, by the alteration of circumſtances, a very ſingular diſtinction; for it

now

now happens, that tho' a man acquitted of an indictment for murder may afterwards be appealed, yet a perſon who is found guilty of what is at preſent conſidered as a leſs offence, under the name of manſlaughter, is not liable to be appealed under this ſtatute, becauſe his clergy has been allowed.

THE other parts of this act either enforce the obſervance of certain common-law proceedings in caſe of murder, or direct ſome new methods to be followed on the like occaſion.

IT was declared, that ſhould any one be murdered in the day-time, and the murderer eſcape, the townſhip ſhould be amerced; and as well the coroner ſhall enquire thereof upon view of the body, as juſtices of the peace, who are to certify it into the king's-bench. Coroners are to deliver their inquiſitions before the juſtices of the next gaol-delivery within the county; and if the murderer is in gaol, they are to proceed to the trial of him, or put the ſaid inquiſitions to the king's-bench. Fees are appointed for the burthens of this office, notwithſtanding the prohibition of ſtat. Weſtm. 1ſt. id. and a penalty is inflicted for neglects of duty. As a part of the ſame ſcheme for preventing public diſorders, and for keeping the police under good government, it was directed, that juſtices of the peace ſhould certify at the next ſeſſions all recognizances of the peace, that the party bound may be called; and if he does not appear, the recognizance, with the record of default, is to be certified into the chancery, king's-bench, or exchequer.

THE authority of juſtices of the peace was further ſtrengthened by c. 3. of the ſame ſtatute. It had been permitted by ſtat. 1 Rich. III. to *every* juſtice of peace to bail perſons arreſted for light ſuſpicion of felony; but this authority, as it was given to every ſingle juſtice, had been abuſed, and many heinous offenders, not main-pernable by law, had been let out upon the country; ſo that this ſtatute, which was deſigned only to alleviate the condition of felons before trial, had contributed to obſtruct the execution of juſtice. To obviate which, that ſtatute was repealed; and it was now ordained, generally, that the juſtices of peace in every county, city, or town, *or two of them at leaſt*, ſhall have authority to let to bail perſons main-pernable by law, to the next general ſeſſions, or gaol-delivery; and one of them at leaſt is to certify the ſame to the ſeſſions or gaol-delivery, under the penalty of 10l. Sheriffs and keepers of gaols are to certify the names of their priſoners at the next gaol-delivery, to be calendred before the juſtices of the deliverance of the gaol, under the penalty of 5l. In this manner was the article of bailing felons, and the delivery of gaols, begun to be put in the courſe it has continued in ever ſince *.

Bailing felons by juſtices of the peace.

* Vid. 1 and 2 Ph. and M. and 2 and 3 Ph. and M.

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THE remaining alterations made in the order of criminal proceedings are compriſed in the firſt part of ſtat. 3 Hen. VII. c. 1. to which we have juſt alluded, and ſtat. 11 Hen. VII. c. 3. The firſt concerns the ſtar-chamber; the other relates to informations filed at the ſeſſions.

The ſtar-chamber new-modelled.

THE criminal juriſdiction exerciſed by the king's council we have had occaſion to notice in the early periods of this hiſtory; and that they ſat in this capacity, ſometimes *en la chambre des eſtoyers*, appears by a roll before quoted in the reign of Ed. III (*a*). There are many inſtances where this tribunal had exerciſed its authority in the period which elapſed from that reign, to the time of which we are now ſpeaking (*b*). This judicature, in its original eſtabliſhment, was very extenſive, and comprehended a great variety of objects within its cognizance. As the conſtitution of our legal polity became more ſettled, and the boundaries of juſtice more exactly defined, this extraordinary authority was in proportion circumſcribed. Many ſtatutes had been made during the later period, which aſſigned particular modes of enquiry for offences, which were uſually before examined there; and ſome checks were put upon the application of complainants: inſtances of which we have before remarked. In this manner was the prerogative judicature of the king in council gradually reſtricted by poſitive conſtitutions; and from being originally, in ſome degree, above the law, had ſhrunk into a compaſs ſo ſmall, and had withal become ſo precarious in its foundation, as to ſtand in need of ſome parliamentary ſanction to give it ſupport and authority. Theſe were the reaſons which led to enacting ſtat. 3 Hen. VII. c. 1. a ſtatute which did not erect, as ſome have imagined, but only *new-modelled* the court of ſtar-chamber. However, the eſtabliſhment given to this court by the ſtatute of Henry, was confined to the inſtances therein enumerated. The deſign, ſcope, and extent of this act will be better ſeen by a mere rehearſal of it.

THE preamble ſtates, that "the king, remembering how by unlawful maintenances, giving of liveries, ſigns, and tokens, and retainers by indentures, promiſes, oaths, writings, or otherwiſe, embraceries of his ſubjects, untrue demeanings of ſheriffs in making of pannels and other untrue returns, by taking of money by juries, by great riots and unlawful aſſemblies, the policy and good rule of this realm is almoſt ſubdued; and for the not puniſhing of theſe inconveniencies, and by occaſion of the premiſſes, little or nothing may be found by enquiry;" that is, by the ordinary proceeding by jury; "whereby the laws of the land in execution may take little effect,

(*a*) *Cloſe Roles de anno* 41 Ed. III. Lamb. Archeion, 149. (*b*) Lamb. Archeion, 149 to 154. 4 Inſt. 60, 61.

to

to the increaſe of murders, robberies, perjuries, and unſureties of all men living," &c. for the reformation of which, it was now ordained, that the chancellor, and treaſurer, and privy-ſeal, or two of them, calling to them a biſhop and a temporal lord, being of the council, and the two chief juſtices, or, in their abſence, two other juſtices, upon bill or information put to the chancellor for the king, or any other, againſt any perſon for any miſbehaviour abovementioned, have authority to call before them by writ or privy-ſeal the offenders and others, as it ſhall ſeem fit, by whom the truth may be known; and to examine and puniſh after the form and effect of ſtatutes thereof made, in like manner as they ought to be puniſhed if they were convict after the due order of the law.

This is the ſubſtance, and nearly the very words, of the ſtatute; which plainly point out the occaſion of this new regulation, the objects of cognizance, the judges, the proceſs and proceedings, with the power of puniſhing; from which it is manifeſt, that the king's council derived by this ſtatute an enlargement of its judicial authority. There is nothing prohibitory of the former juriſdiction or mode of proceeding here; but that is, on the contrary, recognized, as it were, and affirmed by the very cautious manner in which the enacting part of this ſtatute is worded: for, inſtead of ſaying that the chancellor, &c. *ſhall* have authority, it barely ordains, that the chancellor, &c. *have* authority, &c. thereby plainly intimating an apprehenſion of a pre-exiſtent authority, and only declaring more particularly the exerciſe of it in ſome certain caſes.

It ſhould ſeem, that whereas, before this ſtatute, the king and council did not admit any complaint but ſuch only as carried with it, according to *Lambard*'s expreſſion, a reaſonable ſurmiſe of maintenance of their juriſdiction (*a*); for proof alſo of which the complainant ought by ſtat. 15 Hen. VI. c. 4. to give ſureties; now, by this act, beſides that ancient authority, three only of the council, namely, the chancellor, treaſurer, and privy-ſeal (taking to their aſſiſtance others thereby appointed), were enabled to hear and determine ordinarily of thoſe eight offences, and that without any manner of ſuch ſuggeſtion or ſurmiſe at all.

Some defects of this ſtatute were ſupplied by ſtat. 21 Hen. VIII. c. 20. by which the preſident of the council is added to the former three principal perſons. A doubt which remained upon this act, whether the biſhop, lord of the council, and juſtices, were only aſſiſtants, or had equal authority with the three great officers, was removed by this later act; which declares, that they are only there for their advice. And laſtly, the bill or information,

(*a*) Lamb. Archeion, 167.

which

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which by the former act was to be exhibited to the chancellor, is by the later to be put in generally; that is, to the king, as formerly.

THUS by the operation of these two statutes, the abovementioned eight offences, which before were only cognizable by indictment or action, might now be tried without any inquest or jury, by the bare examination either of witnesses or of the parties themselves; a course not allowed by the law as then understood and established, which required a trial *per legale judicium parium suorum*, and therefore this proceeding must have been instituted by statute. This innovation was devised, says the statute, because the ordinary proceeding at common law was found unable to reach such offenders. However, the punishment to be inflicted was such as would have followed, had the prosecution been at common law.

THE alteration made as to these offences by this act, consists principally in the circumstances of place, process, judges, and trial; the nature of the crime and its punishment remaining as it was before. If, therefore, the council departed from the measure of the penalty, or in any consideration of the crime varied from the judgment of the common law, it must be understood, that they then acted under the former authority which they originally possessed as the council of the King, and not by virtue of these statutes. For that authority still remained; and the council, in the understanding of the law, and in the execution and practice of their authority, sat and acted in both capacities, as appears by the books of entries during the reigns of Hen. VII. and Hen. VIII. which two princes did often sit there in person, under each jurisdiction (*a*).

IT is to this mixture of judicial power that the star-chamber was indebted for the tremendous authority which it begun to exert soon after this time. While the statute of Hen. VII. gave vigour and efficacy to its proceedings, the immeasurable prerogative of its ancient judicature furnished an inexhaustible source of crimes and punishments, to be called forth on all occasions, and for every purpose. It became, on that account, the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign; as may be seen by the history of the princes of the house of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal. The star-chamber exercised a criminal jurisdiction almost without limitation, and altogether without appeal; taking upon it to judge and animadvert upon every thing in which the government felt itself interested. It became, in truth, as much a court of state, if the expression may be allowed, as a court

(*a*) Lamb. Archeion, 168, 171, 172, 173.

of

of law, by puniſhing all obnoxious perſons, who, tho' they had been guilty of no breach of the law, had nevertheleſs ſome way or other offended the prince or his miniſters. As the members of this tribunal were the great and confidential officers of the crown, there was no difficulty in thoſe times of procuring a ſentence againſt offenders of that deſcription. The penalties inflicted by this court were ſo extravagantly ſevere, and the very deſign of its judicature ſo repugnant to the ſpirit of a free conſtitution, that it was always viewed with the greateſt abhorrence by the ſubject; and at length, when political liberty begun to vindicate its claims with more boldneſs than it ever had before, was totally aboliſhed by parliament (*a*).

Informations at the ſeſſions and aſſizes.

ANOTHER innovation upon the common law, and of a much more general nature than the former, was effected by ſtat. 11 Hen. VII. c. 3. which permitted juſtices of aſſize and of the peace, upon information, to hear and determine without a jury, all offences (except treaſon, murder, or felony) committed againſt any ſtatute not repealed. This act was probably dictated by that prevailing inclination of Henry and his miniſters to enforce the obſervance of old penal ſtatutes, or rather to compel payment of ſuch penalties as were incurred by a breach of them. This ſcheme of filling his exchequer was unpopular, and therefore not fit to be truſted, in any part of it, to the verdict of common jurors. Whether this was the reaſon of the law, or a general jealouſy of the trial by jury, it was a regulation not to be endured, and was repealed in the beginning of the next reign (*b*).

IT was by colour of this act that Empſon and Dudley, who were juſtices of the peace through all England, were enabled to effect ſuch infinite oppreſſions and exactions upon the people. Upon this act, too, a new office was erected, and thoſe two perſons were made *maſters* of the king's forfeitures. The reaſon of repealing this act is ſtated to be, "for that by force thereof it was known many ſiniſter, crafty, feigned, and forged informations had been purſued againſt many of the king's ſubjects, to their great damage and vexation."

THESE are all the alterations made in our law by ſtatute in this reign. We ſhall now ſpeak of the deciſions of courts.

SOMETHING was added to the curioſity and learning of limitations in tail, and in remainder, by the reſolutions of courts, in this reign. After ſome former determinations, it might be no more than a concluſion from them, that a gift of land to the wife of A, and the huſband of B, and the heirs of their two bodies begotten, was a good limitation in ſpecial tail, on account of the poſſibility there was that they might one day marry, after the death of

(*a*) Stat. 16 Car. I. (*b*) Stat. 1 Hen. VII. c. 6.

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their preſent huſband and wife. (*a*) "*To the right heirs of* I. S." were held good words of purchaſe, in limiting a remainder (*b*).

We have before ſeen the opinion of Littleton, upon a perpetuity created by judge Richil; where his objections to ſuch kind of gifts are ſtated with great pains and learning. However, it ſeems to have been a prevailing opinion, that conditional reſtrictions, in ſome ſhape, might be impoſed on limitations in tail. In 11 Hen. VII. 6. b. a gift of land was made to a man in tail, remainder to his right heirs in tail, upon condition, if tenant in tail or his heirs aliened in fee, that the donor or his heirs might enter. This condition was held good by all the juſtices. However, it may be remarked, that this reſtriction ſo far differed from that againſt which Littleton argued, that here it was a condition of which the donor or his heirs was to take advantage of by entry; there the benefit was to accrue to the next in limitation; whoſe entry, on account of forfeiture, was not analogous to the eſtabliſhed courſe and deſign of ſuch penal conditions, which were always reſerved to be taken advantage of by the maker. It muſt at the ſame time be obſerved, that this reſolution was after recoveries had been allowed to bar eſtates tail; and a great partiality to entails muſt ſtill have ſubſiſted, for the judges to determine ſuch a condition to be good, when the eſtate of the tenant in tail on which the condition was annexed might have been barred, with all claims and rights, whether by condition or otherwiſe; at leaſt, ſo is the preſent doctrine as to the effect of a recovery. But by the opinion of the judges in this caſe, it ſhould ſeem, that a power to reſtrain the ſuffering a recovery was conſidered as reſiding in the donor; that being a ſpecies of alienation.

The firſt inſtance of a ſtrong implication to ſupport a deviſe, we find in this reign. A man gave all his goods to his wife; and further declared, that after her deceaſe, his ſon ſhall have the houſe where the goods are. It was hereupon agreed by all the judges, that this was an eſtate for life to the widow by implication (*c*).

The chancery.

The chancellor continued in the exerciſe of that equitable juriſdiction, which had been gradually aſſumed by his predeceſſors. Beſides queſtions upon uſes, the grand ſubject of diſcuſſion in that court, we find the following points were there conſidered:

The firſt caſe we ſhall mention is more remarkable for the manner of the judge, than the matter of the inquiry. Two perſons were appointed executors, and one releaſed a debt due to the teſtator, without the aſſent of his companion. It was ſuggeſted in a bill in chancery, brought by the other

(*a*) 15 Hen. VII. 10. (*b*) 12 Hen. VII. 27. (*c*) 13 Hen. VII. 17.

executor,

executor, that the will could not on that account be performed, and therefore a *ſubpæna* was prayed againſt the executor, and the perſon to whom he had made the releaſe. It was there argued, that the plaintiff in equity was without remedy, for every executor has an entire power in himſelf; and as one could do that which his companion might, the releaſe was good. "It is againſt reaſon (ſaid the chancellor), that one executor ſhould have all the goods, and give a releaſe by himſelf. I know very well that every law ſhould be conſiſtent with the law of God, and that law forbids that an executor ſhould indulge any diſpoſition he may have to waſte the goods of the teſtator; and if he does (ſays the chancellor with ſome emphaſis), and does not make amends, if he is able, he ſhall be damned in hell." But, upon the point of equity, he thought there ſhould be a remedy; "for the words of the teſtament are, *conſtituo tales eſſe executores meos, ut ipſi diſponant*, &c. Their power is hereby joint, and not ſeveral; and therefore if one does an act without the other, he does it without a warrant. Again, it is *pro ſalute animæ meæ*, &c. and therefore if they diſpoſe it otherwiſe, they do what they have no authority for. At common law (ſays he), if a commiſſion of the peace iſſues, this gives no juriſdiction to try felons; and if a letter of attorney is given to make livery of one acre, a livery of two is without warrant, and void. Now, in this caſe, the teſtament is their warrant, and the laſt declaration of the teſtator's will; and ſhould they exceed that, there ſhould be ſome remedy, as I conceive." Thus argued the chancellor; and the cauſe ſtood over for further conſideration (*a*).

WHERE a cogniſee, in a ſtatute merchant, had extended the land, and the cogniſor ſold the land and ſuffered a recovery of it, it was held, that as he could not falſify the recovery, there ſhould be a remedy by *ſubpæna* for the tenant. Again, where an obligation was paid without a releaſe, and where one was bound to I. S. to the uſe of W. N. and I. S. releaſed the debt, in both theſe caſes there was relief by *ſubpæna* (*b*). To enforce the proceſs of the court, it was held, that the penal ſum in the *ſubpæna* was *in terrorem*; and if it was not obeyed, the chancellor might aſſeſs a fine upon the party. This aſſeſſment being a judgment, it was held a *ſcire facias* might iſſue upon it (*c*).

THE learning of uſes in this reign run into great nicety and refinement. Beſides the progreſs they would of themſelves, as a ſubject of legal diſcuſſion, make towards attaining a more artificial form, particularly as they were now connected with queſtions of entails, the ſtatute of Richard III. by giving a power to *ceſtui que uſe* concurrent with that of the feoffee to make common- Uſes.

(*a*) 4 Hen. VII. 4. b. (*b*) 7 Hen. VII. 11. (*c*) 10 Hen. VII. 5. a.

law

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law gifts and conveyances, gave riſe to perplexities of a new ſort. It was held, that when *ceſtui que uſe* exerciſed this power, and made a leaſe, the reverſion was in the feoffees, and not in him; who by the ſtatute had nothing but a power, and no eſtate. The conſequence of this was, that the feoffee had the action of waſte and other incidents to the reverſion, except only the rent, which belonged to the *ceſtui que uſe* (*a*). The feoffee was ſtill conſidered as the legal owner, and might even have an action of treſpaſs againſt *ceſtui que uſe*; who, notwithſtanding he might now diſpoſe of the land, could not take any of its produce without being a treſpaſſor (*b*). It was not probable ſuch a complication of rights ſhould long be exerciſed over the ſame ſubject, without creating many intricate queſtions.

As to conveyances to uſes, hitherto we have taken notice only of feoffments to a uſe; but it appears in this reign that a new method had been practiſed, which, particularly ſince the ſtatute of Richard III. had entirely ſuperſeded the neceſſity of any common-law conveyance: this was *by bargain and ſale*. This was done two ways; either the *ceſtui que uſe* ſold to another the uſe, and the feoffee from that time ſtood ſeiſed to the uſe of the vendee; or, the bargainor being ſeiſed of the actual freehold, ſold the uſe of it to the vendee; in which caſe he ſtood ſeiſed to the uſe ſo ſold. This was tranſacted without even the formality of a deed, and was held good even in a court of common law (*c*). The validity and ſenſe of this depended upon the goodneſs and fairneſs of the contract. The vendee having paid the money, had done that which imported in itſelf a good conſideration; and as in the laſt of the two inſtances before ſtated, he could not have the land, there being no contract for it; and he had really contracted for the uſe in the former, which was the only thing reſiding in the *ceſtui que uſe*; it was reaſonable that he ſhould have a title to the profits, which might, even before the ſtatute of Richard III. be enforced in a court of equity.

Thus a bargain and ſale reſted upon the goodneſs of the conſideration. Indeed, in all caſes, ſo eſſential was a conſideration to give being to a uſe, that it grew to be a maxim, that where a feoffment was made without conſideration, the uſe reſulted back to the feoffor, and the feoffee was ſeiſed only to the uſe of the feoffor. The reaſon of which was this: The determination on the validity of uſes being left with the chancellor, who judged according to conſcience and equity, he thought that when a feoffment was made, and it remained doubtful whether it was in *uſe*, or in *purchaſe*; conſidering that purchaſes were notorious, and would generally prove themſelves; and that uſes were ſecret, and needed ſtrong reaſons to ſupport their exiſtence; he,

(*a*) 8 Hen. VII. 8. (*b*) 15 Hen. VII. 2. (*c*) 21 Hen. VII. 6. b.

perhaps,

perhaps, thought it more expedient to put a purchaſer to prove his conſideration, than the feoffor and his heirs to prove the truſt; by which means the intendment was always towards the uſe, and the proof lay on the purchaſer (*a*).

HENCE it was that a conſideration became the great point upon which thoſe deeds of conveyance turned, that were afterwards invented in order to raiſe and to convey uſes.

ONE of theſe was by way of *covenant*; which had been attempted in this reign for the firſt time, but without ſucceſs. The following was a caſe of that kind: It was covenanted by a man and his wife and B, that B ſhould have the land to him and the heirs of his body; and upon default of ſuch iſſue, that the land ſhould remain to the huſband and his wife in fee. This was held void. Another inſtance, where this new conveyance was again tried, was, where it was covenanted that the lands and tenements of one ſhould *deſcend*, revert, or remain, to his ſon and heir apparent in conſideration of marriage, and to the heirs of him and his wife. It was adjudged that this covenant did not change the uſe, for two reaſons: one was, that it was a matter *in futuro*, and not executed; the other, becauſe it was put in the alternative, and therefore was uncertain whether to remain *or* revert. It was accordingly held that the parties had no remedy but by action of covenant. When another covenant of marriage of the ſame nature was brought in queſtion, in 21 Hen. VII. (*b*) the ſame opinion was ſtill adhered to.

BUT tho' theſe deeds were rejected by the courts of law, which ſeemed determined not to allow that a uſe could be raiſed by covenant, it cannot be doubted but ſuch conveyances met with favour in the court of chancery; which, conſidering the nature of a uſe as exiſting merely by contract and agreement, could hardly heſitate about decreeing the ſpecific performance of a deed ſo peculiarly adapted to the purpoſe for which it was formed. We are induced to think they really were ſupported in chancery, from the many precedents now extant (*c*) of ſuch covenants made in this reign: moſt great eſtates were ſettled in this way; and in the next reign we ſhall ſee that theſe covenants were expreſly adjudged legal by the courts of law.

THESE deeds were uſually made on the occaſion of marriage, in order to make a ſettlement of ſome part of the eſtate for the benefit of the widow and the iſſue. They were made ſometimes before, and ſometimes after, marriage; and were expreſſed to be made on that or ſome other conſideration. The diſpoſition thereby uſually made, was, an eſtate for life to the huſband and wife *jointly*, remainder to the iſſue of the marriage in tail, with re-

(*a*) Bacon's Tracts, 317. (*b*) 18. 19. (*c*) Vid. Mad. Form. Angli.

mainders

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mainders over. Theſe were again qualified with proviſos and conditions, upon which eſtates were to ceaſe or commence, and uſes were to ariſe or be revoked, in a ſtile and with a length unknown to the ſimplicity of the common law. Theſe novelties, however, were greatly multiplied by the fancies of conveyancers in the next and ſubſequent reigns.

THE joint eſtate for life to the huſband and wife was intended as a maintenance for the wife, if ſhe *ſurvived*, in lieu of her dower, of which ſhe was deprived where her huſband's eſtate was in uſe, and not in ſeiſin. This was now the caſe with much of the landed property of the kingdom; and therefore theſe *jointures*, as they were called, were become very common.

Aſſumpſit.

THE point which had been ſo long deſired, and upon which the courts at laſt had ſhewn ſome inclination to agree, namely, to allow an action of *aſſumpſit* in caſes of executory promiſes, was ſettled by a judicial deciſion in the third year of this reign (*a*). The circumſtances of that caſe were theſe: The defendant had promiſed, for a certain conſideration, to procure a leaſe for the plaintiff; inſtead of which he obtained it for himſelf, in deceit of the plaintiff. It was held by the court, that the action well lay; and when it was objected, upon the old notion, that nothing had been done to execute the bargain, ſo that the action was for a *non*-feaſance (which could not be), and not for a *miſ*-feaſance; Brian put a caſe, whether if he promiſed upon conſideration to make a feoffment to one perſon, and he afterwards made it to another, that would not be a great *miſ*-feaſance? endeavouring in this manner to ſatisfy the ſcruples of ſuch as ſtill adhered to the old opinion.

THIS was the firſt determination by which an action at law was eſtabliſhed as a remedy for non-performance of executory promiſes. The prodigious conſequence this was of in a commercial country may be eaſily imagined, and was diſcerned by the legiſlature; who ſeeing the credit that actions upon the caſe had riſen to, when the many determinations of the late reigns upon them was cloſed with ſo important a one as this, paſſed an act which gave them the ſame proceſs as was before in the action of debt (*b*). As the neceſſity of recurring to a court of equity to eſtabliſh ſuch agreements was not now ſo abſolute as before it had been, there is no doubt but ſuits upon theſe queſtions fell back again into the old channel. This kind of caſe came again before the court in the 21ſt year of this reign, when the above deciſion was confirmed by the unanimous opinion of the whole court.

LAW-WAGER, which had been in a great degree ſuperſeded by the increaſe of actions upon the caſe, was contracted by a reſolution, that it ſhould not be allowed in an action upon a ſtatute (*c*).

(*a*) 3 Hen. VII. 14. (*b*) Stat. 19 Hen. VII. c. (*c*) 10 Hen. VII. 18.

THE

THE moſt important deciſion in this reign, was that which gave a new efficacy to ejectments, by adjudging a recovery of the term as well as damages. The conſequence of which was, the old writs of entry, and of aſſize of novel diſſeiſin, with the higher remedies of formedon, and writs of right, went out of uſe; and a title to land was afterwards generally tried by ejectment.

Ejectione firmæ.

AN action *de ejectione firmæ*, or ejectment, was a remedy by which a leſſee being diſpoſſeſſed of his term in land, recovered damages for the treſpaſs in ejecting him. As terms for years were not much conſidered, nor the leſſee looked upon originally otherwiſe than as a kind of bailiff to his leſſor, he was thought ſufficiently compenſated for the injury he ſuſtained, if he recovered *damages* for the treſpaſs and ejectment, without being reſtored to his term, having ſtill a remedy by covenant againſt his leſſor; but as the eſtimation of this property had altered, the notions of law were at length altered to conform to it. If leaſes for years were formerly made ſhort and uncertain in the tenure, in courſe of time it became the practice to grant them of greater length; which increaſing their value, the court of chancery begun to take that cognizance of them which the common law refuſed, but which they at preſent deſerved; and by a rule of redreſs, in which that court much delights, uſed to decree the ejector to make a ſpecific reſtitution of the land for the remainder of the term.

THE courts of law ſeemed lately to incline towards adopting this method of doing ſubſtantial juſtice. In the reign of Edward IV. we have ſeen it was declared by Fairfax (*a*), that a plaintiff in ejectment ſhall recover poſſeſſion of his term, as he would in a *quare ejecit infra terminum*; and it was accordingly ſo adjudged ſolemnly in 14 Hen. VII. (*b*). A copy of the record of which caſe is ſtill to be ſeen in Raſtall (*c*), where the judgment is *quod recuperet terminum ſuum prædictum*; a judgment ſcarce warranted by the original writ, which goes only to damages for the treſpaſs, without any hint at reſtitution. Soon after this important reſolution, ejectments were applied to the recovering poſſeſſion of land, and trying titles, as a remedy leſs inconvenient and tedious than the complicated proceeding in real actions.

THAT an ejectment in this manner might reſtore the poſſeſſion where a *bonâ fide* termor in lawful and permanent poſſeſſion was actually ejected, is obvious enough; but how the ſame proceeding could be applied to try titles, in all caſes, it is not ſo eaſy to imagine.

(*a*) 7 Ed. IV. 6. (*b*) Jenk. Cent. 67 pa. (*c*) 244. b.

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It ſhould ſeem that the firſt way of bringing ejectments to try titles was plain and regular, differing nothing or very little from what ejectments were, when brought to redreſs a real treſpaſs, and to recover damages for it. Something was to be contrived in exact conformity with it. As a term was to be recovered, a term muſt firſt be created, and an ejectment from that term muſt be effected, upon which the action was to be grounded. It is probable, then, that a perſon claiming title uſed to enter on the land, and there ſeal a leaſe to A. This tranſaction might or might not be known to the tenant in poſſeſſion. The conſtruction of law upon this would be, that, of the two, he was the treſpaſſor who had no title to the poſſeſſion; and barely by being there, without any other act, committed, in law, an ejectment of the other. A, the leſſee, would, for the preſent purpoſe, ſuppoſe the title to poſſeſſion to be in himſelf; and the two requiſites for this action being obtained, he would ſerve a writ of treſpaſs and ejectment againſt the tenant in poſſeſſion, declare, and go on to trial. Then the plaintiff A produced the title of his leſſor, and the defendant the tenant produced that of his leſſor; and ſo the right was completely examined; where, the title to make the leaſe being enquired into as a prefatory matter, they thereby collected who was the treſpaſſor, which was the direct point of diſcuſſion in this action.

This ſeems to have been the obvious, and was probably the firſt way in which a title to land was tried by ejectment. This was regular and ſimple, conſiſtent with the proceſs and proceeding in other actions; but the legal notion of treſpaſs and ejectment was of ſuch latitude, as to leave an opening for fraud and artifice to introduce ſome ſingular novelties into the proceeding by ejectment. If the tenant might be conſidered as a treſpaſſor by continuing in the poſſeſſion after the leaſe made to A, ſo might every one of his ſervants, and every ſtranger who *caſually* came on the land; and theſe, equally with him, might be made defendants, and put to ſhew by what authority they were there. The perſon claiming title would ſometimes take advantage of this, and get a friend to come on the premiſes juſt after A had been put into poſſeſſion by ſealing the leaſe. This made him inſtantly, in law, a treſpaſſor and ejector. He was ſerved afterwards with a writ and declaration, upon which he would give the plaintiff judgment by default; and an *habere facias poſſeſſionem* iſſuing, the tenant in poſſeſſion was turned out, in order that the plaintiff might have full and clear poſſeſſion according to his judgment; the tenant being put to the neceſſity of bringing an ejectment, in his turn, to recover back the land.

A practice like this, ſo unfair and unjuſt, could not long ſubſiſt: the courts took it up, and, in order that the tenant might always be in a capacity to defend himſelf, made it a rule, that execution ſhould not iſſue, till the ejector,

ejector, if a ſtranger, ſhould give notice to the tenant that an action was commenced againſt him, and whether he meant to deſert it; upon which the tenant was allowed to defend it, in his place. However, notwithſtanding this rule took away all the advantage gained by theſe clandeſtine ejectments, the practice of proceeding firſt againſt ſome ſtranger, called ſince a *caſual ejector*, was ſtill kept on foot; for the judgment obtained in this manner remained ſtill good in law, notwithſtanding the tenant was admitted to try his right: it put him under the neceſſity of defending the action, leſt he ſhould be turned out; and, ſhould it be determined by a jury in favour of the plaintiff, execution would iſſue on that much ſooner than could be obtained by judgment on the verdict.

THUS did ejectments receive a new form, owing to circumſtances neceſſarily attending them, and ſome conſequences following from certain legal properties of a treſpaſs. As there can be little doubt but ejectments were conducted in the ſimple manner we have above ſuppoſed, when firſt made uſe of to this purpoſe; ſo there can be little doubt that it became, very ſoon after, the practice to make a caſual ejector, and to proceed as juſt related; the leſſee and caſual ejector being real perſons, as well as the entry and ejectment being real facts. Such the practice continued till the end of queen Elizabeth's reign, and ſome years after, when the practiſers got into the habit of ſhortening the proceſs very materially; and the judges endeavoured to expedite this uſeful action by ſome orders of court; ſo that, all together, it is become a very ſingular and complicated proceeding.

THO' it had been adjudged that the term ſhould be recovered in ejectment; it cannot be ſuppoſed that damages were not, as formerly, recovered for the injury ſuſtained by loſing the intermediate profits; therefore judgment uſed to be as well for the meſne profits as the term. In after times, when an ejectment came to be conſidered rather as a real action, the plaintiff rarely prepared himſelf to prove the actual damages; and therefore upon the ejectment took only nominal damages, and afterwards brought a new action of treſpaſs for the meſne profits; of which action there is no mention till ſome time after the reign of queen Elizabeth.

As this action of ejectment, in the form of it, is for the treſpaſs, and not for the right; every freſh treſpaſs, which could eaſily be effected in the way above ſtated, is a freſh cauſe of action, and the right will every time be incidentally examined; very different from trying a right in ſome real action, where a judgment once given was either a final bar, or drove the party to a writ of a higher nature, and more tedious in its proceſs. From hence it followed, that a title might be tried over and over again between

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the ſame parties, tho' they had each had verdicts againſt them. However, that litigations may not be eternal, when plaintiffs will not be ſatisfied with two or three determinations againſt them, it has not been uncommon, in later times, for a court of equity to interpoſe by injunction, and reſtrain the parties from carrying further a fruitleſs conteſt.

THE gratification of trying a title more than once, together with the eaſe with which this action was conducted, contributed to make it a favourite both with our courts and with ſuitors. This innovation gave the laſt blow to real actions, which, from the period when ejectments came into practice, went into diſuſe; a revolution that at once conſigned to oblivion at leaſt one-third of the ancient learning.

THIS change in the courſe of redreſs may be eaſily accounted for. Real writs were in their nature ſo ſpecial, and in their application ſo unaccommodating, that they were very unmanageable inſtruments in the hands of the practiſer. The *writ of right patent* was not of general uſe, being limited to particular perſons and circumſtances. It could only be brought for lands or tenements; the tenant muſt have a freehold, the demandant muſt claim a fee ſimple. It muſt be brought in the lord's court, who ſometimes delayed holding it; upon which recourſe was to be had to an *alias*, a *pluries*, and at laſt an *attachment*, againſt him; and after all, perhaps, neither he nor his ſteward would diſcharge the office of judge with impartiality; which led to writs of tolt and of pone, to remove the cauſe into a higher court. The writ *de rationabili parte* was, in like manner, confined to the lord's court; and muſt be brought between privies in blood, and for land in fee ſimple. The lower kind of actions had ſimilar difficulties with thoſe in the higher. Formedons in remainder, reverter, and deſcender, were in the ſame manner to be brought by perſons claiming a peculiar eſtate; as was the writ of coſinage, ael, beſael, and various others; all which were better ſupplied by ejectment, which requires no particular eſtate either in plaintiff or defendant; only a right to the preſent poſſeſſion.

THO' the practice had begun of applying ejectments to this purpoſe (*a*), there are no queſtions ariſing upon ſuch actions in the Year-book of this reign. Many titles to real property are there debated in treſpaſs and replevin. The real actions which are met with at this time, are formedon, *præcipe quòd reddat*, and aſſize, with *quare impedit*. Actions upon the caſe were increaſed, and proceedings in attaint ſeemed ſomewhat revived by the qualifying ſtatute made in this reign.

WITH real actions fell a great part of the buſineſs of the common-pleas; in them that court had poſſeſſed an excluſive right of judicature, which now

(*a*) Raſt. Ent. 243, 244.

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begun to be imparted to other courts. Land, as a ſubject of action, was now in the ſame predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Weſtminſter-Hall. The king's-bench, which from a criminal juriſdiction had long before poſſeſſed itſelf of perſonal actions, by help of fiction and intendment, received its ſhare of this acceſſion; and from thence derived an addition to its civil buſineſs, which was greatly increaſing from other cauſes.

PLEADING, in all its branches, had become ſo much ſettled by the repeated diſcuſſion it had undergone in the later period, that the forms in different actions had grown, a good deal, to be matters of courſe. The precedents of Henry VI. and Edward IV.'s time were thoſe now in uſe, and continued ſo during the next reign, as appears from Raſtall's Book of Entries.

As pleading was a ſubject now leſs agitated, more room was left for debating points of law: theſe were treated in the full and ſcientific way with which the courts had begun to decide in the later part of the former period. There is nothing novel in the caſt of learning of this reign, except what aroſe upon *covenants to raiſe uſes*, and upon queſtions grounded on the ſtat. 1 Rich. III. which had allowed *ceſtui que uſe* to make eſtates.

THE following points of criminal law, as practiſed in this reign, are worthy of notice: A man arraigned for felony challenged peremptorily twenty-ſix jurors. It had been the cuſtom, in like caſes, in the reign of Edward IV. to put the priſoner to the *peine forte et dure*; but it was agreed, in 3 Hen. VII. (*a*) that he ſhould be hanged; and they reſolved to make this the practice in their circuits. It ſeems to have been uſual at this time, in caſes of the death of a man, where the proſecutor thought it would not turn out to be felony, to draw the indictment as for homicide, *ſe defendendo*, or as it might be; inſtead of making it, as it generally has been of late, for a felonious killing with malice prepenſe, and leaving it to the jury to find it *ſe defendendo*, or excuſeable homicide. The priſoner, upon ſuch an indictment (namely, *ſe defendendo*), uſed at this time always to go thro' the formality of a trial, and, if found guilty, forfeited his goods; but a pardon iſſued of courſe (*b*).

It was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king would command it by writ (*c*).

HENRY is celebrated by his hiſtorian (*d*) for the many excellent laws he cauſed to be made. He was not leſs attentive to the adminiſtration of his laws

King and government.

(*a*) 12 Bro. Coro. 136. (*b*) 4 Hen. VII. 1. (*c*) 15 Hen. VII. 9. (*d*) Lord Bacon.

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(*a*) Raſt. Ent. 243, 244.

begun

begun to be imparted to other courts. Land, as a ſubject of action, was now in the ſame predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Weſtminſter-Hall. The king's-bench, which from a criminal juriſdiction had long before poſſeſſed itſelf of perſonal actions, by help of fiction and intendment, received its ſhare of this acceſſion; and from thence derived an addition to its civil buſineſs, which was greatly increaſing from other cauſes.

PLEADING, in all its branches, had become ſo much ſettled by the repeated diſcuſſion it had undergone in the later period, that the forms in different actions had grown, a good deal, to be matters of courſe. The precedents of Henry VI. and Edward IV.'s time were thoſe now in uſe, and continued ſo during the next reign, as appears from Raſtall's Book of Entries.

As pleading was a ſubject now leſs agitated, more room was left for debating points of law: theſe were treated in the full and ſcientific way with which the courts had begun to decide in the later part of the former period. There is nothing novel in the caſt of learning of this reign, except what aroſe upon *covenants to raiſe uſes*, and upon queſtions grounded on the ſtat. 1 Rich. III. which had allowed *ceſtui que uſe* to make eſtates.

THE following points of criminal law, as practiſed in this reign, are worthy of notice: A man arraigned for felony challenged peremptorily twenty-ſix jurors. It had been the cuſtom, in like caſes, in the reign of Edward IV. to put the priſoner to the *peine forte et dure*; but it was agreed, in 3 Hen. VII. (*a*) that he ſhould be hanged; and they reſolved to make this the practice in their circuits. It ſeems to have been uſual at this time, in caſes of the death of a man, where the proſecutor thought it would not turn out to be felony, to draw the indictment as for homicide, *ſe defendendo*, or as it might be; inſtead of making it, as it generally has been of late, for a felonious killing with malice prepenſe, and leaving it to the jury to find it *ſe defendendo*, or excuſeable homicide. The priſoner, upon ſuch an indictment (namely, *ſe defendendo*), uſed at this time always to go thro' the formality of a trial, and, if found guilty, forfeited his goods; but a pardon iſſued of courſe (*b*).

It was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king would command it by writ (*c*).

HENRY is celebrated by his hiſtorian (*d*) for the many excellent laws he cauſed to be made. He was not leſs attentive to the adminiſtration of his laws

King and government.

(*a*) 12 Bro. Coro. 136. (*b*) 4 Hen. VII. 1. (*c*) 15 Hen. VII. 9. (*d*) Lord Bacon.

PART II. CHAP. XV. HENRY VII.

when made. In the firſt year of his reign, at the cloſe of the parliament, he deviſed an oath, binding all perſons who took it to obſerve the execution of ſeveral ſtatutes. We are told, that not only thoſe of the houſhold, but thoſe of the houſe of commons, came before the king and lords, and took this oath. After theſe, the peers, both ſpiritual and temporal, were aſked by the chancellor, whether they were willing to take the oath; who all anſwering that they were ready, it was read to them; and every lord ſpiritual laying his right hand on his breaſt, and every temporal lord the ſame on the book of goſpels, ſwore to obſerve and perform the ſame. The ſubſtance of the oath was, not to harbour felons; not to retain any one by indenture or oath, contrary to the ſtatute of liveries; not to encourage maintenance, and embracery, and riots, and unlawful aſſemblies; not to prevent the execution of the king's writs; nor let to bail or mainprize any felons (*a*).

A PRECAUTION like this at once ſhews the king's ſolicitude for the due execution of juſtice; and the protection it needed in times when great men, inſtead of promoting, had been more uſed to defeat the effects of it by force and cabal.

IN every tranſaction of this king there is a regard ſhewn by him to the laws. Tho' no prince was more jealous of his prerogative, or took greater pains to gratify his love of money, than Henry; yet in all inſtances where theſe two grand intereſts were concerned, he ſtill proceeded under the ſanction of law.

IN the 7th year of his reign he revived *benevolences*, invented firſt by Edward IV.; but, more wary than that prince, he did it by conſent of parliament, and raiſed great ſums in that way. He ſtrictly enforced all penal ſtatutes which would contribute any thing towards his exchequer: with the ſame view he cauſed proſecutions to be inſtituted on many old and forgotten laws. Theſe legal oppreſſions, if they may ſo be called, were carried to a great height in the later part of his reign, which rendered him extremely unpopular, if not odious; and ſubjected his two agents in theſe proſecutions, Empſon and Dudley, to a ſevere account in the ſubſequent reign.

THE new-modelling of the ſtar-chamber fell in with Henry's whole plan. It at once ſerved to ſecure his prerogative, by enforcing in all ranks of people a ſtrict obedience to the laws; and became a ſource from whence he was always deriving pecuniary penalties. Theſe penalties uſed to run very high. It is related, that ſir William Capel, an alderman of London, was fined in the ſum of 2743l. an immenſe ſum in thoſe days! and he was obliged to compound for 1615l. This is mentioned only as one inſtance of

(*a*) 2 Parl. Hiſt. 419.

theſe

theſe proceedings. Where criminal proſecutions did not produce fines, the king uſed to make them turn to account, by pardoning corporal pains for pecuniary compenſations to be paid to himſelf.

NOTWITHSTANDING the bad uſe ſometimes made of ſevere laws, it cannot be denied that the temper and deſigns of Henry contributed to eſtabliſh the laws in their full force, and to render the adminiſtration of juſtice more regular and effectual. While this had a good influence on the order and peace of ſociety, it levelled all ranks of men under the ſame ſubmiſſion to lawful authority. The executive magiſtrate, in the perſon of Henry, increaſed in power and diſtinction; while the nobility ſunk below the relative importance they had formerly enjoyed; and the commons continued ſtill in their original imbecility: ſo that the prerogative of the crown had in this reign an opportunity of aggrandizing itſelf to a degree much exceeding what it had been in earlier times, though not equal to what it became in the ſucceeding princes of the line of Tudor.

THERE are no ſtate-trials of this reign now extant; and the chroniclers of the time give very unſatisfactory accounts of theſe things. It is very uncertain what was the charge againſt Sir William Stanley, who was executed for a conſpiracy, as it is related, againſt the king.

THE method introduced by Richard III. of attainting perſons by bill, was purſued by Henry VII. and became henceforward not unfrequently reſorted to, where it was thought the common law could not effectually reach an offender.

THE legal monuments of this reign are the ſtatutes, judicial records, and reports. The ſtatutes underwent no further alteration in the manner of forming them in parliament. The records are from this period, almoſt in a regular ſeries, kept with order, and in good preſervation; as may be ſeen in the repoſitories of the courts of king's bench and common-pleas, in Weſtminſter-Hall. The reports are the *Year-book*, with ſome caſes in the collectors *Jenkins* and *Benloe*; but more particularly in *Keilway*, who lived at this time, and took them himſelf. The year-book of this reign, as it goes more into points of law, and ſuch matters of learning which have ſurvived the times when they were debated, are more deſerving attention than the preceding. We find the counſel and judges ſometimes quoting caſes; and Bracton is once or twice referred to (*a*). But this was not common; they moſtly determined on argument and principles, and thus made precedents for future ages.

(*a*) 1 Hen. VII. 6. b.

Writers.

THERE are no law-treatiſes of this reign in print. But there is a famous book, ſtill in manuſcript, written by *Marrow*, on the office of a juſtice of peace; a work which has been quoted by later writers, ſuch as Fitzherbert and Lambard, with great commendations, and ſeems to have been followed by them on the ſame ſubject. However, they now began to put to the preſs the productions of former times. Statham's Abridgement was printed about the year 1500, as were the ſtatutes and ſome of the Year-books.

END OF THE SECOND PART.



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